Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee

MB Docket No. 02-70

MEMORANDUM OPINION AND ORDER

Adopted: November 13,2002 Released: November 14,2002

By the Commission: Chairman Powell issuing a statement; Commissioner Copps dissenting and issuing a statement.

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I. INTRODUCTION

1. In this Order, **we** consider the joint application ("Application")[1] filed by Comcast Corporation ("Comcast") and AT&T Corp. ("AT&T") (collectively, "Applicants") for approval to transfer control of certain licenses and authorizations to AT&T Comcast Corporation, **a** newly created company, pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("Communications Act").[2] To obtain Commission approval, Applicants must demonstrate that their

[1] Applicarions for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp. to AT&T Comcasr Corporation. MB Docker **Nu.** 02-70 (filed Feb. 28, 2002).

[2] 47U.S.C. §§ 214(a), 310(d).

proposed transaction will serve the public interest, convenience, and necessity.[3] In this regard, we have traditionally weighed the potential public interest harms of the proposed merger against the potential public interest benefits to ensure that Applicants have shown that, on balance, the benefits outweigh the harms.[4]

2. We consider this merger against the backdrop of litigation that resulted in judicial remand of the Commission's cable horizontal ownership limit, which prohibits any cable operator from owning attributable interests in systems serving more than 30% of the nation's multichannel video programming distributor ("MVPD") subscribers. AT&T's acquisition of MediaOne in 2000 violated this limit as a result of MediaOne's attributable interest in Time Warner Entertainment. L.P. ("TWE"). The Commission conditioned its approval of the associated license transfer on AT&T's divestiture of TWE. Shortly before the compliance deadline, the U.S. Court of Appeals for the District of Columbia Circuit held the Commission had failed to justify its ownership cap and remanded the matter to the Commission. The Commission subsequently initiated a rulemaking proceeding to consider the ownership rule in light of the remand. That rulemaking is pending.

3. The proposed merger would combine the nation's largest cable operator, AT&T, with the nation's third largest cable operator, Comcast, to create a new entity, AT&T Comcast, which would serve approximately 27.02 million subscribers, or 28.9% of all U.S. MVPD subscribers.[5] In addition, upon closing of the merger, AT&T Comcast would acquire AT&T's 27.64% interest in the nation's second largest cable operator, TWE.[6] The TWE cable systems serve approximately 12.8 million subscribers.[7] Including the subscribers served by TWE, the merged firm would have attributable ownership interests in cable systems serving approximately 38.34 million subscribers, or 41% of all nationwide MVPD subscribers.[8]

4. Applicants have asked us to approve the combination with the TWE interest appropriately insulated and placed in trust for divestiture. In their Application, Applicants stated that as

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[3] *Id. See also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group. Inc., Transferor. to AT&T Corp., Transferee,* 15 FCC Rcd 9816, 9817 ¶ 1 (2000) (*"AT&T-MediaOne Order"*); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp.. Transferee,* 14 FCC Rcd 3160, 3168 ¶ 13 (1999) (*"AT&T-TCI Order"*).

[4] *AT&T-MediaOne Order,* 15 FCC Rcd at 9817 ¶ 1

[5] As of June 30, 2002, AT&T had approximately 18.51 million total subscribers and Comcast had approximately 8.51 million total subscribers. *See* Letter from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corporation. to Marlene H. Dortch, Secretary, FCC (Sept. 20, 2002) ("Applicants' Sept. 20, 2002, Ex Parte").

[6] Some of TWE's cable systems are managed by Time Warner Cable. Inc. ("TWI"). For ease of reference, TWE and TWI will be jointly referred to herein as TWE.

[7] This figure includes the 1.48 million subscribers served by Texas Cable Partners and Kansas City Cable Partners, systems that are owned jointly by AT&T and TWE. *See* note 14, *infra*. In order to avoid double-counting when combining the total subscribers of AT&T and TWE, we include the 1.48 million subscribers in AT&T's total subscriber count of 18.51 million subscribers, but we subtract them from TWE's total subscriber count of 12.8 million.

[8] The cable ownership attribution rules. 47 C.F.R. § 76.503 n.2, determine whether the size or type of an entity's ownership interest in a cable system is such that it confers on the entity the ability to influence or control the operations of the cable system or creates economic incentives to take actions that concern the Commission. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* 14 FCC Rcd 19014. 19016 ¶ 1 (1999) (*"Attribution Order"*). As noted above, to avoid double-counting of subscribers served by AT&T's two partnerships with TWE. these subscribers are subtracted from TWE's total subscriber count for purposes of calculating the combined subscriber reach of AT&T Comcast and TWE.

of the merger's closing. they will have no attributable interest in TWE. Subsequently, Applicants specified the mechanism by which they would accomplish this result, pledging to place TWE and any successor interests in a trust upon the merger's closing and to fully divest themselves of any interest in TWE within five-and-a-half years after the merger's closing. Therefore, we condition our decision on the TWE interest being appropriately insulated and placed in trust for divesture. **As** such, our analysis of the public interest harms and benefits below examines only the combined AT&T and Comcast cable systems and their programming interests, and does not consider those interests that are attributable only through AT&T's interest in TWE. **As** discussed below, we find that the proposed **trust** adequately insulates the TWE interest from attribution to the merged firm. Accordingly, in the analysis below, the terms "AT&T Comcast." "the merged firm," and "the merged entity" refer **to** the combined company *without* an attributable interest in TWE.

5. Commenters express concern that AT&T Comcast's vertical interests, particularly in regional and local programming, combined with increased clustering in major markets, will give the firm enhanced incentive and ability to discriminate against its competitors. They believe that AT&T Comcast's increased market share may make it easier for the firm to deliver its affiliated regional and local programming terrestrially. placing it beyond the scope of the Commission's program access rules. Commenters also believe the merger may increase the firm's incentive and ability to secure exclusive distribution agreements with programmers that are not affiliated with any cable operator and therefore are not subject to the program access rules. Those rules, which were adopted to implement section 628 of the Communications Act, apply only to satellite-delivered programming in which a cable operator has an attributable ownership interest. We conclude that the merger is not likely to result in the alleged harms, and we decline lo impose conditions regarding the use of exclusive contracts.

6. In addition, we examine allegations made by commenters with respect to both Applicants' business practices. in particular, targeted discounts and marketing strategies. Although we believe that such practices may be designed and employed to achieve anticompetitive results, we are unable to link such practices to the merger.

7. Finally, we address potential harms regarding high-speed Internet service, telephony, set-top boxes, and interactive television ("ITV"). As discussed below, we conclude that some of these potential harms are not merger-specific; that is, if they exist. they arc not an outgrowth of the merger. With respect to other potential harms, we find that the record docs not demonstrate that such harms are likely to materialize.

8. With respect to potential public interest benefits, Applicants contend that the proposed merger will accelerate the development and deployment of facilities-based high-speed Internet access services, digital video, and other advanced services such as high definition television ("HDTV"), video on demand ("VOD"), and ITV. Applicants also assert that the merger will allow them to provide facilities-based local telephone competition to incumbent local telephone exchange carriers ("incumbent LECs"), particularly by leveraging AT&T's expertise and experience in this market. Applicants further contend that the merger will increase the supply of local and regional programming, and will permit the merged company to compete more effectively in the selling of national, regional, and local advertising.

9. We find that the merger is likely to result in some public interest benefits associated with accelerated deployment of broadband services. Because of the significant technical and operational uncertainties that remain in the commercial deployment of Internet protocol ("IP") telephony, however, we give minimal weight to Applicants' claim that the proposed transaction would accelerate deployment of cable telephony.

10. After reviewing the record in this proceeding, we conclude that the potential public interest benefits, on balance, outweigh the potential public interest harms of the merger. Accordingly, subject to certain conditions, we conclude that approval of the Application to transfer control of

Commission licenses and authorizations from AT&T and Comcast to AT&T Comcast will serve the public interest, convenience, and necessity.

II. BACKGROUND

A. The Applicants

1. AT&T.

11. *Cable and MVPD Services.* AT&T is the nation's largest cable operator.[9] T&T has attributable interests in systems serving approximately 18.51 million subscribers.[10] AT&T offers its subscribers traditional video products, including local broadcast stations, national, regional, and local cablc networks, premium movie channels, and pay-per-view services. As of December 31, 2001, approximately 76% of AT&T's cable plant had been upgraded to at least *550* MHz, and *59%* had been upgraded to at least 750 MHz.[11]

12. AT&T generally divides its interests in cable systems into three categories: (1) owned and operated systems, in which it has a 100% ownership interest; (2) consolidated systems, in which it has an interest greater than 50%, but less than 100%; and (3) non-consolidated systems, in which it has an interest of 50% or less.[12] As of June 30, 2002. AT&T had 13.13 million subscribers in its owned and operated system,, 130,000 subscribers in its in its only consolidated system, Mile Hi Cable Partners, L.P, and 5.25 million subscribers in its non-consolidated systems, excluding TWE.[13] AT&T's non-consolidated cable systems include investments in companies, joint ventures, and partnerships that provide cable. video programming, telephony, and high-speed Internet services. These non-consolidated interests include AT&T's interest in TWE, which owns both cable systems and video programming services. TWE serves approximately 12.8 million subscribers and is the nation's second largest cable operator.[14] AT&T's non-consolidated interests also include Insight Midwest, a Delaware limited partnership which owns and operates cable systems in Indiana, and serves approximately 1.3 million subscribers. As general partner, Insight Communications manages the business *of* the partnership, although certain matters require the approval of AT&T.[15] Another AT&T non-consolidated interest is Texas Cable Partners ("TCP"), a Delaware limited partnership that owns and operates cable systems in Texas, and serves approximately 1.12 million customers. The remaining 50% partnership interest is owned by Time Warner Entertainment-Advance/Newhouse Partnership, approximately two-thirds of which is owned hy TWE. The general manager *of* Texas Cable Partners is TWE, although certain governance matters require approval of a management committee, on which AT&T and Time Warner Entertainment-Advance/Newhouse Partnership have equal representation,[16] AT&T also owns a 50%

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[9] AT&T Broadhand is a wholly-owned subsidiary of AT&T Corp Through the merger, AT&T Corncast will acquire only (hose assets of and services provided by AT&T Broadhand. In this order, AT&T Corp. and AT&T Broadhand Corp will he referred to as "AT&T."

[10] *See* Applicants' Sepr. 20, 2002, Ex Parte

[11] Application at 18

[12] *Id.*

[13] *See* Applicants' Sept. 20. 2002. Ex Parte.

[14] *Id.;* Applicarion ai 51. TWE's 12.8 million subscribers include 1.48 million subscribers served by two cable systems, Texas Cable Partners and Kansas City Cable Partners. that are owned jointly by AT&T and TWE. *See* discussion, *infra.* Their combined 1.48 million subscribers are included in AT&T's total subscriber count of 18.51 million suhscribcrs. *See* note 7, *supra.*

[15] Applicarion ai 19.

[16] *Id.*

interest in Kansas City Cable Partners ("KCCP') --with the remaining 50% interest being owned by TWE -- serving approximately 310,000 customers in Kansas and Missouri."

13. *Video* ***Programming Networks.*** AT&T states that it has dramatically reduced its ownership of video programming services." On August 10, 2001, AT&T completed a tax-free spin-off of Liberty Media Corporation, which owns all of the assets attributed to the Liberty Group, including interests in a large number of video programming services. Liberty Media Corporation is now an independent, publicly traded company, which is separate from AT&T and no longer attributable to AT&T under the Commission's rules.[19] AT&T also recently reduced its voting interest in Cablevision Systems Corp. ("Cablevision") to 4.98% and irrevocably waived its right to nominate two directors to the Cablevision board of directors, making its Cablevision interest no longer attributable to AT&T.[20] Cablevision owns 77.1% of Rainbow Media Holdings, Inc. ("Rainbow"), which owns interests in a number of national and regional programming services.[21] Additionally, last year, AT&T sold all *of* its interests in the Food Network, The Outdoor Life Network, Speed Channel, and The Sunshine Network."

14. AT&T currently owns attributable interests in three national video programming services: (1) E! Entertainment (10%); (2) style (10%); and (3) "DEMAND (44%); and five regional services: (1) Fox Sports New England (50%); (2) New England Cable News (SO%); (3) Pittsburgh Cable News Channel (30%); (4) Empire Sports Network, L.P. (33.33%); and (5) AT&T3 (100%).[23] Through its ownership interest in TWE, AT&T also has an interest in certain programming services owned by TWE, including HBO, Cinemax, Comedy Central, and Court TV.

IS. ***Internet Services.*** AT&T has over 1.5 million high-speed Internet service customers. AT&T's Internet service is available to almost 15 million households, or approximately 61% of homes passed by AT&T cable systems.[24] Through its ownership of TWE, AT&T has an indirect interest in Road

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[17] Other AT&T non-consolidated systems includc Pamassos Communications. L.P.. serving approximately 464,000 customers; CC VIII, L.L.C.. serving approximately 903.000 customers; US Cable of Coastal - Texas, L.P.. serving approximately 144.000 customers; Midcontinent Communications, serving approximately 200,000 customers; and Century-TCI California Communications, L.P., serving approximately 767,000 customers. *See* Applicants' Sept. 20. 2002. Ex Parte, Appendix.

[18] Application at 24.

[19] ***See Applications for Consent to the Transfer of Control of Licenses and Secrion 214 Authorizations from Tele-Communications, Inc., Transferor,*** *to AT&T Corp.,* ***Transferee,*** 17 FCC Rcd 8985, 8986 ¶ 3 (2002).

[20] Application at 20-21

[21] **NRC** owns the other 22.9% of Rainbow. Rainbow's national program services include American Movie Classics. Bravo, Independent Film Channel. Mag Rack, MuchMusic USA, and Women's Entertainment. Rainbow's regional program services include the Fox Sports Net services. MSG MetroGuide, MSC Metro Learning Channel, MSG Network. MSC Traffic and Weather. and News 12 Networks. ***See id.*** at 20.

[22] *Id.* at 24. Comcast now owns 100% of The Outdoor Life Network.

[23] *Id.* at 25; Letter from Douglas G. Garrett, Vice President Law, AT&T Corp., to Marlene H. Dortch, Secretary, FCC (Oct. 3. 2002) ("Applicants' Oct. 3, 2002, **Ex** Pane"); Letter from Michael Hammer, Willkie Farr & Gallagher. to Marlene H. Dortch, Secretary, FCC (Oct. 16, 2002). Comcast also **owns** interests in E! Entertainment, style, and INDEMAND.

[24] Application at 22-23. Prior to its bankruptcy, Excite@Home maintained and operated many of the facilities that cnnnected AT&T's hcadend equipment to the public Internet. In connection with the bankruptcy and shutdown of the Excite@Home network. AT&T built a replacement network to service AT&T customers. ***id.*** at 23. AT&T is consolidating customers currently on the network built by the former "Road Runner" partnership onto the new AT&T network.

Runner. which TWE owns.[25] AT&T further states that it plans to take a number of steps to enhance the attractiveness of its high-speed Internet service offerings, including the addition of features such as home networking and remote e-mail access.[26]

16. *Local Telephone Service.* AT&T currently markets cable telephony service to approximately seven million households in 16 markets and serves more than 1.5 million lines." In the past year, AT&T added almost one-half million new cable telephony customers.[28] Currently, AT&T offers cable telephony services in Atlanta. Boston, San Francisco, Chicago, Dallas, Denver, Hartford, Jacksonville, Pittsburgh, Portland (Oregon), Richmond, Seattle, Salt Lake City, St. Louis, southern California, and Minneapolis-Si. Paul. AT&T states that it offers consumers a variety of options and calling plans with various price points, ranging from basic single line service to multiple lines with full feature functionality.[29]

2. Comcast.

17. ***Cable** und MVPD **Services.*** Comcast is the nation's third largest cable operator. As of December 31, 2001, Corncast's wholly-owned cable systems served 8.51 million customers in 26 states and passed approximately 13.8 million homes.[30] Corncast offers its customers traditional video products, including local broadcast stations; national, regional, and local cable programming channels; premium movie channels; and pay-per-view services. Due to recent plant upgrades, 95% of Comcast's subscribers are now served by systems that provide a bandwidth of 550 MHz **or** higher, and over 80% of its suhscnbers are served by systems that provide a bandwidth of 750 MHz or higher." By the end of 2001, Comcast provided digital cable service to 2.3 million subscribers, or 27% of its total subscriber base. As of February 2002, Comcast's digital cable service was available to nearly 99% of its subscribers."

18. Certain Comcast MVPD service offerings have interactive features, including an electronic program guide ("EPG") with enhanced functionality and parental controls.[33] **As** of February 2002. Comcasl offered VOD service to cable systems passing over three million homes in 16 markets. Corncast's VOD service offers subscribers functionalities similar to those available on videocassette and digital video disc ("DVD") players, *i.e.*, stop. pause, rewind, and fast-forward.[34] Comcast also has conducted ITV trials in selected markets with Wink Interactive Television and Liberate Interactive Television, allowing subscribers to access program-related information such as weather, sports, and trivia; to play two-way games; to make purchases; and to change the language of a program's audio

[25] ***AT&T-MediaOne Order.*** 15 FCC Rcd at 9863 ¶ 107. Pursuanr to its consent decree with the DOJ, AT&T has divested its directly held interest in Road Runner, which it acquired as a result of the AT&T-MediaOne merger. Application at 23 n.36.

[26] Application at 23.

[27] *Id.* at 3. *23*

[28] *Id.* at 23

[29] *Id.* at **24.**

[30] *Id* **at** 10. *See also* Applicants' Sept. 20. 2002, Ex Parte. In addition to its wholly-owned systems, ***Comcast*** has a 30% general parrnership interest in Clearview Partners, which operates cable systems in Maryland **and** Pennsylvania. serving a total of approximately 11,000 subscribers. Application at 10-11

[31] Applicarion at 10.

[32] *Id.*

[33] *Id.* at 11

[34] *Id.*

component."

19. ***Video Programming Networks.*** Coincast has attributable interests in four regional programming networks: (1) cn8, The Comcast Network (100% ownership interest), which provides news, public affairs, and sports programming to viewers in Pennsylvania, New Jersey, Delaware, and Maryland: (2) Comcast SportsNet (78% ownership interest), a regional sports network serving the Philadelphia area: (3) Comcast SportsNet-MidAtlantic (100% ownership interest), a regional sports network serving the geographic area from Baltimore to portions of North Carolina; and (4) Comcast Sports Southeast (72% ownership interest), a regional sports network serving Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.[36]

20. Additionally, Comcast has attributable interests in eight national programming networks: (1) QVC (58%); (2) the Discovery Health Channel (20%); (3) E! Entertainment (40%); (4) The Golf Channel (91%); (5) iNDEMAND (11%); (6) The Outdoor Life Network (100%); (7) style (40%); and (8) The G4 Network (94%).[37] Comcast also produces two short-form news and public affairs programs, Comcast Newsmakers and Comcast Local Edition, that appear twice hourly on the channel carrying CNN Headline News and are available to Comcast subscribers in portions of Connecticut, Delaware, Maryland, Michigan, New Jersey, Pennsylvania, and the Washington, D.C. metropolitan area.[38]

21. ***Internet Services.*** Comcast offers high-speed Internet access service to **10.4** million households, or approximately 75% of the homes that Comcast cable systems pass." **As** of December 31, 2001, Comcast had over 948,000 high-speed Internet service customers.[40]

22. ***Local Telephone Service.*** Corncast provides telephone service, including long distance service, to approximately 41,500 customers in Maryland, Virginia, and Michigan." In addition, Comcast Business Communications ("CRC"), a wholly owned subsidiary of Comcast, offers integrated broadband communications services to over 4,000 business and governmental customers in Pennsylvania, New Jersey, Delaware, Maryland, and Michigan.[42] CBC's services include exchange access, private line, and long distance services. CBC also provides competitive local exchange service to several dozen small and medium-sized business customers.[43]

23. ***Other** Holdings.* Comcast has a majority interest in two major-leaye sports franchises, the Philadelphia Flyers National Hockey League franchise and the Philadelphia 76ers National Basketball Association franchise; Philadelphia's two major indoor sports arenas; and several minor league baseball and hockey teams.[44] Comcast also has a majority interest in Broadnet, which offers high-speed Internet

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[35] *Id.* at 12.

[3h] *Id.* at 14-15.

[37] *Id.* at 15. AT&T also owns interests in E! Entertainment, style, and INDEMAND.

[38] *Id.* at 15; 32-44.

[39] *Id.* at 12.

[40] *Id.* Corncast's Internet service was previously provided in partnership with Excite@Home, which had contractual responsibility **for the** maintenance **and** operation of many of the facilities that connected Corncast's headend equipment to **the** Internet. **As** a result of Excite@Home's recent bankruptcy, Corncast transferred all of its Internet subscribers to a network that it owns and manages. *Id.* ai 12-13.

[41] ***If!.*** at 13.

[42] *Id*

[43] *Id.* at 13-14.

[44] *Id.* ai 15-16.

access and e-business services in Europe.[45] Comcast is a limited partner in Comcast Interactive Capital. a venture capital fund ihai invests in companies focused on interactive, infrastructure, and Internet technologies and applications.[46]

B. The Merger Transaction and the Application to Transfer Licenses

24. *Proposed Transaction.* On December 19, 2001, Comcast and AT&T entered into an Agreement and Plan of Merger (the "Merger Agreement").[47] Under the Merger Agreement, AT&T Broadband Corp., a holding company for AT&T's broadband division, will be spun-off to AT&T's shareholders. Upon completion of the spin-off, both Comcast and AT&T Broadband will merge with and become wholly-owned subsidiaries of AT&T Comcast Corporation." Upon completion of these mergers, Comcast shareholders will receive one share of the corresponding class of AT&T Comcast stock for each of their shares of Comcast stock, and AT&T shareholders will receive in the aggregate for their shares of AT&T Broadband common stock 1.235 billion shares of AT&T Comcast Class A stock.[49] Prior to the merger's closing, Applicants will place AT&T's interest in TWE in trust and will divest the interest pursuant to the terms of a trust agreement that insulates the interest from attribution.[50]

25. *Department of Justice and Local Franchising Authority Review."* In addition to Commission review, the proposed merger is subject to revicw by the Department of Justice ("DOJ") and the various franchising authorities that have local jurisdiction in the areas where Applicants provide service. Applicants have completed initial regulatory filings for license transfers in connection with the proposed merger with 1,791 local franchising authorities.[52] As of November 13, 2002, 1,765 of the franchising authorities have either consented to the transfers or allowed the 120 day review period to elapse without objection.[53] Of Comcast's 660 local franchising authorities, 658 have consented or not objected to the transfer, and of AT&T's 1,131 local franchising authorities, 1,107 have consented or not objected to the transfer.[54] Applicants are continuing to pursuc approval from the remaining local franchising authorities.[55] Following the Commission's announcement of its ruling in the proceeding, DOJ announced that it had closed its investigation of the merger and would not challenge it.[56]

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45 *Id.* at 16

46 *Id.*

41 *Id* at I

48 *Id.*

49 *Id.*

50 *See* Section IV.A.2.c., *infra.*

51 Pursuant io section 617 of the Communications Acr, local franchising authorities wirh jurisdiction to review such irantfers or sales of cable systems have 120 days from the date of Applicants' request for a franchise transfer to render a decision. *See* 47 U.S.C. § 537: 47 C.F.R. § 76.502.

"*See* Letter from A. Renee Callahan, Lawler, Metrger & Milkman. LLC. to Marlene H. Dortch, Secretary, FCC (Nov. 13. 2002) ("Applicants' LFA Ex Parte"). A cable operator must obtain local franchising authority approval for the transfer or sale of its cable system only if the franchise agreement so requires. 47 U.S.C. § 537.

53 Applicants state this figure in a perceniage. 98.55%. Applicants' LFA Ex Pane ai I

54 Applicants also state these figures in percentages. 99.7'70 and 97.9% respectively. *Id.*

55 *Id.* The twenty-six local franchising authorities ihai have not consented io the transfers are listed in an Attachment to Applicants' LFA Ex Pane.

56 DOJ, *Justice Department Will Not Challenge Merger of Comcast and AT&T* Broadband (press release), November 13, 2002.

111. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

26. Pursuant *to* sections 214(a) and 310(d) of tltc Act, the Commission must determine whether Applicants have demonstrated that the proposed transfer of control of AT&T's and Corncast's licenses and authorizations will serve the public interest, convenience and necessity." In making this determination, we first must determine whether the proposed transaction complies with the specific provisions of the Act,[58] other applicable statutes, and the Commission's rules. The public interest standards of sections 214(a) and 310(d) involve a balancing process that weighs the potential public inrerest harms of the proposed transaction against the potential public interest benefits." Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the puhlic interest." If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for hearing.[61]

27. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"[62] which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services." The Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act **to** promote diversity and competition among media voices: It ***has*** long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."" Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.[65] In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change, as well as trends within the communications industry.[66]

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[57] 47 U.S.C.§§ 214(a), 310(d)

[58] Section 310(d) requires that we consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act. 47 U.S.C. § 310(d). Thus, we must examine AT&T Comcast's qualifications to hold licenses. **See** 47 U.S.C. § 308.

[59] ***See, e.g., Applications of VoiceStream Wireless Corp., Powerful, Inc.*** *and* ***Deutsche Telekom AG.*** 16 FCC Rcd 9779. 9789 ¶ 17 (2001) *("DT-VoiceStream")*; *AT&T Corp.,* ***British Telecommunications, plc,*** ***VLT Co.*** L.L.C., ***Violet License Co. LLC, and*** *TNV [Bahamas]* ***Limired Applications For Grant of Secrion 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture*** *Between* ***AT&T Corp.*** *und* ***British*** *Telecommunications, plc*, 14 FCC Rcd 19140, 19146-47 ¶¶ 13-15 (1999).

[60] *See, e.g., AT&T-TCI Order*, 14 FCC Rcd at 3169 ¶ 15.

[61] 47 U.S.C. §309(e). Section 309(e)'s requirement applies only to those applications to which Title III of the Act applies. *i.e.*, radio station licenses. We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would he served by granting the application,, **see** ***ITT World Communications, Inc. v. FCC,*** 595 F.2d 897, 900-01 (2d Cir. 1979), hut of course we may do so if we find that a hearing would be in the public interest.

[62] *AT&T-MediaOne Order,* 15 FCC Rcd at 9821 ¶ 10; *AT&T-TCI Order,* 14 FCC Rcd at 3168-69 ¶ 14

[63] *See* 47 U.S.C. § 157; Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. ***56; AT&T-MediaOne Order.*** 15 FCC Rcd at 9821 ¶ 11; *cf.* 47 U.S.C. §§ 521(4), 532(a).

[64] *Turner* ***Broadcasting System,*** *Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting ***United*** *States v.* ***Midwest Video*** *Corp.*, 406 U.S. 649, 668 n.27 (1972)).

[65] *AT&T-MediaOne* ***Order,*** 15 FCC Rcd at 9821 ¶ 11

[66] *Id.*

28. In determining the competitive effects of the merger, our analysis is not limited by traditional antitrust principles.'" The Cornmission has independent authority to examine communications mergers, and the standards governing the Commission's review differ from those of antitrust enforcement authorities.[68] The DOJ and the Federal Trade Commission ("FTC") review mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition in any line of commerce.[69] The Commission, on the other hand, is charged with determining whether the transfer of licenses serves the broader public interest. In the communications and video programming industries, competition is shaped not only by antitrust rules. but also by the regulatory policies that govern the interactions of industry players.[70] In addition to considering whether the merger will reduce existing competition, therefore. wc also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets." We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors. and create opportunities to disadvantage rivals in anticompetitive ways.[12]

IV. POTENTIAL PUBLIC INTEREST HARMS

A. Video Programming Services

29. In this section, we consider potential public interest harms of the proposed merger on video programming. As discussed in greater detail below, there are two general categories of harms to video programming that commenters allege might result from the merger. First, the merger may harm the upstream market for the production and packaging of video programming. In addition, the merger may harm competition among MVPDs in the market for distribution of video programming.

30. With respect to harms to the production and packaging of video programming, section 613(f)(2)(A) of the Communications Act provides that the Commission shall "ensure that no cable operator or group of cable operators can unfairly impede . . . the flow of programming from the video programmer io the consumer."" Pursuant to this directive, we found in the *Horizontal Third Report and Order* that a cable operator's ownership of systems serving more than 30% of MVPD subscribers nationwide would likely harm diversity and competition by enabling two large multiple system operators ("MSOs") acting in concert or in parallel to determine, by their program carriage decisions, which programmers will be able to survive in the marketplace." We find that the post-merger subscriber reach

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[67] *See Satellite Business Systems,* 62 FCC *2d* 997, 1088 (1977). *aff'd, sub nom Unired States v. FCC,* 652 F.2d *72* (DC Cir. 1980)(*en banc*), *Northeast Utilities Service Co. v. FERC,* 993 F.2d *937,* 947 (1[st] Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice. . . **must** apply").

[68] *AT&T-TCI Order.* 14 FCC Rcd at 3168-69 ¶ 14

[69] 15 U.S.C. § 18

[70] *AT&T-Media **One** Order,* 15 FCC Rcd at 9821 ¶ 10-11

[71] *Id*

[72] *See, e.g., Applications for Consent to the Transfer of Licenses and Secrion 214 Authorizations by Time Warner, Inc. and America Online. Inc., Transferors. io AOL **Time** Warner, Inc., Transferee,* 16 FCC Rcd 6547, 6553 ¶ 16 (2001)(*"AOL Time Wartier Order"),Applications of NYNEX Corp. and Bell Atlantic Corp. for Consenr io Transfer Control of NYNEX Corp. and Its Subsidiaries,* 12 FCC Rcd 19985, 20035 (1997) ***("Sell Atlantic-NYNEX** Order").*

[73] See 47 U.S.C § 533 (f)

[74] *See generally Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992,* 14 FCC Rcd 19098(1999) (*"Horizontal Third Report and Order").*

is not likely to augment Applicants' bargaining power to the extent that the merger will impair the quality or quantity or programming available to consumers. We also find that the merger's effects on national and regional horizontal reach are not likely to cnable AT&T Comcast to foreclose unaffiliated programmers. Accordingly. we conclude that the merger *is* not likely to harm the public interest with respect to competition in the programming market. Because we are conditioning our approval on the insulation and divestiture of AT&T's interest in TWE, we need not determine here whether or to what extent the combination with TWE would produce public interest harms absent the conditions. To the extent commenters raise concerns regarding an industry-wide trend toward clustering of cable systems, we concludc that the appropriate forum to consider such issues is a rulemaking of general applicability, such as the Commission's pending rulemaking on cable horizontal ownership.

31. The merger's potential harm to rival MVPDs derives chiefly from the possibility that the merger could enhance AT&T Comcast's incentive and ability to foreclose MVPD rivals from access to affiliated and unaffiliated programming." We find that thc merger's effects on regional concentration are not likely to result in the terrestrial delivery of affiliated programming and that the merger therefore is not likely to enable AT&T Comcast to harm its MVPD rivals by entering into otherwise prohibited exclusive contracts for the distribution of such programming. With respect to the distribution of programming sold by vendors that are not affiliated with any cable operator, we find that the merger is not likely to alter materially each Applicant's existing inccntive and ability to deny MVPD competitors access to such programming and that the mcrger itself therefore is not likely to harm competition in this respect. Accordingly, we conclude that the merger is unlikely to harm the public interest with respect to the distribution of programming by rival MVPDs. We therefore decline to impose conditions restricting the use of exclusive contracts that are otherwise permitted by the Commission's program access rules.[76] The Commission's pending rulemaking on cable horizontal ownership is the more appropriate forum for consideration of the potential effects of industry-wide clustering on the distribution of programming by MVPDs to consumers.

32. **We** begin this section with some background on the production, packaging and distribution of video programming and with a discussion AT&T's interest in TWE. We then consider potential harms in the upstream markets for the production and packaging of video programming. Finally, we consider whether the merger may adversely affect competition among MVPDs in the market for the distribution of video programming.

1. Background

a. Production, Packaging, and Distribution of Video Programming

33. Our analysis of the potential harms of the proposed merger depends on the relative bargaining power of video progamming networks and MVPDs. Video programming is sold by video programming networks to MVPDs, who then deliver the programming to consumers. In addition to large cable MSOs, MVPDs include direct broadcart satellitc ("DBS") providers and cable "overbuilders." Ovcrbuilders compete against cable incumbents in local franchise areas and may includc a second cable operator, delivering MVPD services over a separate cable plant; multi-channel multipoint distribution

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[75] The merged entity will have interests in the following *national* and regional programming networks: cn8 – The Comcast Network: Comcast SportsNet (Philadelphia); Conicast SportsNet – MidAtlantic; Comcast Sports Southeast: QVC; Discovery Health Channel; E! Entertainment: The Golf Channel; INDEMAND; The Outdoor Life Nctwork; style: G4 Network: Fox Sports New England; New England Cable News; AT&T3; Pittsburgh Cable **News** Channel.

[76] The Commission's program access rules prevent cable operators from entering into exclusive contracts with programmers that are affiliated with a cable operator and whose service is delivered via satellite. 47 C.F.R. 676.1000 *et seq.*

services ("MMDS" or wireless cable); or satellite master antenna television ("SMATV") providers. These MVPDs bundle programming networks into groups of channels or "tiers" and sell this programming to consumers, deriving revenues from subscription fees and the sale of advertising time that they receive through their carriage agreements. MVPDs sometimes seek exclusive access to certain programming to ensure that their direct compctitors are unable to offer it to their subscribers.

34. Companies that own programming networks produce their own programming and/or acquire programming produced by others, then package this programming for sale to MVPDs. Generally, programming networks seek to reach the widest range of subscribers for their type of programming on a regional or national basis, to increase the value of their programming to advertisers, and to build brand recognition that will spur other MVPDs to carry their programming. Because programmers incur high fixed costs associated with the development of programming, programming networks must have access to a critical number of viewers to avoid a financial loss.

35. Video programming networks sell programming to MVPDs based on contracts generally lasting a term of several years.[77] Some programming networks depend on a large, nationwide audience for profitability. Other programming networks do not seek a national audience but are regional or even local in scope, including regional sports and news networks. Some programming networks likely can survive with distribution to a few million subscribers within a certain region, while others may need nationwide distribution to a large percentage of MVPD homes in order to remain viable.[78]

36. MVPDs can negotiate substantial discounts based on the number of subscribers to which the network will be transmitted, as well as other factors such as the network's placement on a particular tier.[79] Ultimately, the more concentration among buyers, the more likely buyers will possess some market power over programming.

37. Although some programming networks are vertically integrated with MVPDs. many are unaffiliated with any MVPD. The Commission has recently recognized that regional programming services, the majority of which are satellite delivered, are significantly more vertically integrated than national programming services." For example, *86%* of "must have" regional sports programming is verrically integrated."

b. AT&T's Interest in Time Warner Entertainment

38. Through its wholly-owned subsidiaries, AT&T owns a limited partnership interest of 27.64% in TWE (the "TWE Interest"). Suhsidiaries of AOL Time Warner, Inc. ("AOL Time Warner") hold the remaining 72.36% of TWE. TWE was formed in 1992 to own and operate substantially all of the business of Warner Bros., Inc., HBO, and the cable television businesses owned and operated by Time Warner, Inc. ("TWI") prior to that time. TWE owns cable systems serving 11.32 million subscribers and manages systems owned by AOL Time Warner outside of TWE that serve an additional 1.48 million

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[77] *Implementation of Section 11 ofthe Cable Television Consumer Protection and Competition Act of 1992,* 16 FCC Rcd 17312. 17322 ¶ 11 (2001) ("*Further Notice*").

[78] *Id.* at 17322 ¶ 12.

[79] This issue, and its effects on competition among MVPDs of varying size, will be discussed in further detail below.

[80] *Implementation of the Cable Television Consumer Protection and Competition Act of* 1992, 17 FCC Rcd 12124. 12131-32 ¶¶ 18-19 (2002) (noting that 35 percent of national programming services are vertically integrated while 59 percent of regional programming services are vertically integrated).

[81] *Id* at 17 FCC Rcd at 12145 ¶ 49

subscribers.[82] TWE is the second largest MVPD after AT&T. AT&T acquired the TWE Interest through its acquisition of Mediaone Group, Inc. TWE is governed by a Board of Representatives (the "TWE Board") and is operated by a management committee. AT&T has exercised its right to appoint two directors to the TWE Board, but as a result of its merger with Mediaone, has no representation on the management committee.[83]

39. In *AT&T-MediaOne*, the Commission found that TWE would be attributable to AT&T, and that. as a result, the merged firm would reach 41.8% of U.S. MVPD subscribers. Thus, AT&T's acquisition of MediaOne violated our cable horizontal ownership cap, which prohibits any cable operator from serving more than 30% of all U.S. MVPD subscribers.[84] Accordingly, the Commission approved the license transfer application subject to the condition that AT&T, by May 19, 2001. either (a) divest the TWE Inrerest, (b) terminate its involvement in **TWE's** video programming activities, or (c) divest its interests in other cable systems. such that it would have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide.[85] The Commission also imposed interim safeguards that were intended to protect against potential harms to competition in the video programming market by limiting the merged firm's ability to exert influence or control over TWE during the period between merger closing and completion of the required divestiture.[86] The conditions fell short of establishing AT&T's non-involvement in TWE's video programming activities through exceptions to our cable ownership attribution rules, but the conditions were sufficient to limit the merged firm's involvement in **TWE's** video programming activities for the limited period of time until the merged firm could be brought into compliance with our ownership cap.[87]

40. On March 2, 2001, the United States Coun of Appeals for the D.C. Circuit released its ***Time Warner*** decision, in which it reversed and remanded our horizontal ownership limit,[88] and vacated the "no sale" element of the insulated limited panner ("ILP") exemption[R9] to our attribution rules."' In

[82] TWE also manages TCP, which is jointly owned by AT&T Broadhand and Time Warner-Advancernewhouse Partnership, **and KCCP,** which is owned hy AT&T Broadhand and TWE.

[83] Application at 57-59. According to the Applicants, the TWE Board has never met. *Id*

[84] *AT&T-MediaOne* ***Order,*** 15 FCC Rcd at 9836 ¶ 40; **47** C.F.R. § 76.503.

[85] *Id.* The order was released on June 6, 2000, so the divestiture period was approximately 11 months long

[86] *Id.* at 9849 ¶ 72 and 9898 Appendix B. The conditions provide that AT&T and TWE cannot share officers or directors, and bar AT&T from appointing AT&T employees with video programming oversight to the TWE Board. AT&T officers, directors, and employees are nor permitted to "influence, attempt to influence. or otherwise participate in" the management or operation of the video programming activities of TWE. The conditions alsu provide that AT&T and TWE cannot share information concerning the price, terms, and conditions they negotiate for carriage of video programming on their respective cable systems. In addition, AT&T and TWE are barred from negotiating volume discounts or other favorable terms from video programming vendors based on their joint subscriber reach. *Id.* We also imposed several conditions governing AT&T's sale of programming to TWE through its programming affiliates. *Id.*

[87] *Id.* at 9849 ¶ 72

[88] ***Time*** *Warner Entertainment Co. v. FCC.* 240 F.3d 1126 (D.C. Cir. 2001) ***("Time Warner").*** The D.C. Circuit found that the Commission's horizontal rule restricts cable operators' ability to reach viewers and that the vertical rule curtails their exercise of editorial control over a portion of their channels. The court held that the Commission did not establish record evidence to support the limits, did nor draw the necessary connection between the limits established and the alleged harms of concentration and integration the limits were designed to address, and did not tahe into account the changing industry market conditions. Accordingly, the court reversed and remanded the limits.

[89] *See* note 217. ***infra*** (discussing ILP criteria).

light of the D.C. Circuit's ruling, we suspended the *AT&T-MediaOne* compliance deadlines pending further review of the relationship, if any, between the *Time Warner* decision and the conditions in the *AT&T-MediaOne Order.*[91] We upheld this suspension on reconsideration in November 2001, concluding that it was appropriate to continue the suspension of the deadlines pending resolution of the issues on remand.[92] The Commission's cable ownership cap and the no sale tule are being evaluated as pan of a rulemaking proceeding commenced in September 2001.[93] The *AT&T-MediaOne* Compliance deadlines remain suspended.

2. Potential Harms to the Production and Packaging of Video Programming

41. In general, competition depends on having choices between products that are fairly good substitutes for each other. If consumers have such choices, a single provider cannot raise its prices above the "competitive" level because consumers will switch to a substitute. The level of competition depends on what products are substitutes (product market), where these substitute products are available (geographic market), what firms produce them (market participants). and what other firms might be able to produce substitutes if the price were to rise (market entry). To evaluate the impact of a merger on competition. we examine the characteristics of competition in the markets of the merging firms and determine the impact of the merger on these characteristics. Mergers raise competitive concerns when they reduce the availability of substitute choices (market concentration) to the point that the merged firm has a significant incentive and ability to engage in anticompetitive actions (such as raising prices or reducing output) either by itself, *or* in coordination with other firms. Economic theory describes both how such anticompetitive actions can harm consumers and how the magnitude of the harm can be measured.

a. Relevant Markets and Market Participants

42. In evaluating the potential competitive effects of a merger, it is necessary to first delineate the relevant product and geographic markets.[94] In this case, however. we note that a wide variety of firms produce and/or package video programming, which they then license to video programming distributors, including MVPDs. Thus, for example, there are national cable networks, such as QVC or the Discovery Channel; providers of premium programming channels, such as HBO; and regional programming networks, such as New England Cable News or the Fox Sports services.[95] The

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[90] *Time Warner,* 240 F.3d. at 1143. Although the court states that it is vacating the no-sale rule at the outset of the *Time Warner* decision, the court also suggests at another point that it is merely reversing and remanding the rule. *Id.* at 1144.

[91] *Applications for Consent to the Transfer of Control of Licenses and Secrion 214 Authorizations from* **MediaOne** *Group, Inc., Transferor, to AT&T Corp., Transferee,* 16 FCC Rcd 5835 (2001).

[92] *Applications for Consent io the Transfer of Control of Licenses and Secrion 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferer,* 16 FCC Rcd 5610 (2001).

[93] *Further Notice,* 16 FCC Rcd 17312. The Further Notice also addresses the Commission's channel occupancy rule, or vertical ownership limit. as well as the single majority shareholder exemption to our cable and broadcast attribution rules.

[94] *Application of EchoStar Communications Corporation (a Nevada Corporarion). General Motors Corporation, arid Hughes Electronics Corporation (Delaware Corporations), Transferors, and EchoStar Communications Corporation (a Delaware Corporation), Transferee,* FCC 02-284 (rel. Oct. 18, 2002) at ¶ 105 (*"EchoStar-DirecTV Order").*

[95] There are also national broadcast networks, such as NBC, ABC. CBS and Fox: and local television stations, most of which *are* affiliated with a national television network. However. we are not evaluating possible effects regarding

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record in this proceeding is insufficient for us to determine whether particular types of video programming, such as a regional sports service or home improvement network, fall within the same relevant product market. As discussed below, however. it is unnecessary to conduct such a rigorous market definition in order to analyze the potential competitive effects on these markets." For purposes of analyzing possible anticompetitive effects on the production and packaging of video programming, therefore. we can consider the admittedly overly-broad market of all video programming distributed hy MVPDs.

43. Because video programming today is transmitted in the form of digital bits that can be transported long distances at little cost, buyers can seek geographically distant sellers, and sellers can seek geographically distant buyers. Applicants assert that "[t]he relevant geographic market for the purchase and sale of video programming is quite broad and, for many types of programming, international in scope."[97] We find that the relevant geographic market is at least national in scope. We recognize, however, that the demand for different types of programming may vary from region to region. Thus, for example, a New England sports network *is* likely to be more popular in New England than in the Southwest United States. This does not affect the definition of the relevant geographic market, however. Rather, it is simply the differences in the product characreristics of particular video programming packages that cause them to have different demands in different geographic areas, which suggests that particular types of programming may be in different relevant ***product*** markets. As discussed below, however, these differences in demand among geographic regions are critical in analyzing the potential competitive effects of the merger.

b. Monopsony Power and Rent Shifting

44. Some commenters argue that programming and MVPD competition will be harmed by Applicants' increased subscriber reach. which will give the merged firm monopsony power (*i.e.*, significant bargaining power) in negotiations with programmers.[98] They allege that the merged firm's receipt of deep programming discounts would impair the ability of programmers to produce or acquire highquality programming and would Force programmers to lower the overall quality of their offerings, or exit the market altogether.[99] The commenters argue that these discounts are greater than what would he expected from any transactions cost efficiencies that may result from the merger (*e.g.*, reductions in marketing, distribution, sales, administration, and legal expensec), and higher discounts would thereby result in fewer program development costs being recovered from the merged firm than from Applicants separately.[100] Commentcrs also allege that such actions would harm MVPD competition by raising rivals' costs if programmers shift cost recovery to the merged firm's compctitors. or if exclusive contracts

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broadcast programming. Our analysis is properly limited to the relationship between the merged entity and the programmers selling to them and other MVPDs.

[96] As Applicants assert. delining the relevanr product market "is complex because video programming producers have many distribution outlets and the importance of those outlets niay vary from one type of programming to another." Application at 68.

[97] *Id.* Commenters have not directly addressed this issue

[98] CFA Comments at 10-11, 13-15; Qwest Comments at 6-9, citing Haring er al. Decl. ("Haring Decl.") at 8, 19; SBC Comments at 12-13, Gertner Decl. ¶ 20; Verizon Comments at 11. Monopsony power is the inverse of monopoly power. In a pure monopoly, there are several buyers with only one seller; in a pure monopsony. there are several sellers with only one buyer.

[99] Implicitly, these cummenrers assume that the quality of programming is positively related to the cost of producing the programming.

[100] Qwest Comments at 6-9; SBC Comments at 12-13; Verizon Comments at 11

preclude rivals from obtaining programming.[101] By raising rivals' costs of programming, commenters argue, the merger may lessen competition and the ability for the MVPD marketplace to constrain cable prices.[102]

45. Applicants reply that volume discounts are not proof that the merged firm will have the ability to control the price of programming.[103] Applicants broadly estimate that the merged firm should save between $250 and $450 million a year on license fees negotiated with programming networks.[104] Applicants state that the merged firm's increased bargaining power will result only in a reduction of the rate of increase each firm would pay for programming costs, and in programmers taking a lower, yet still positive, profit.[105] Applicants assert that the merged firm would not have excessive bargaining power because programmers have alternative distribution outlets enabling them to reach more than 70% of the MVPD market, including DBS and other MVPDs.[106] Applicants also assert that the merger does not risk raising rival MVPDs' costs of programming, arguing that if programmers could receive higher programming rents from other MVPDs, they would already be doing so.[107]

46. Some commenters argue that unaffiliated programmers will be harmed by the merged firm's vertical integration.[108] They believe the merged entity may have the incentive and ability to foreclose access to its cable systems by unaffiliated programming packagers or producers, particularly if the merged firm has sufficient market power in the distribution of programming that it can profitably refuse to carry programming its customers desire.[109]

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[101] *Id.* We discuss the effects of exclusive contracts in the programming market in further derail below.

[102] SAC states that a program supplier niay react to a reduction in price by seeking higher prices from other MVPDs. SRC Comments, Gertner Decl. ¶ 25. If it is unable to obtain higher prices. it may exit the market, thereby harming consumers by reducing the amount and diversity of programminp. *Id.* If MVPDs pay the higher prices and pass them through to consumers. consumers will be harmed. *Id.* ¶ 26.

[103] Applicants' Reply Comments at 39-40.

[104] Applicarion at 32 n.51; Application, Pick Decl. ¶ 21 Applicants admit that this estimate is based on several assumptions, including "the actual terms of specific programming contracts, broader trends in programming prices. and the dynamics of individual negotiations between AT&T Comcast and the sellers of video programming." *Id.* Applicants belicvc that there savings will result from obtaining the highest price discount that applies currently to either AT&T or Corncast, and negotiating higher volume discounts on new contracts given the combined subscriber base of the merged firm. Application, Pick Decl. ¶ 19: Applicants' Reply Comments at 39-40. Applicants also believe that some of the savings will result from transactions cost efficiencies from programming networks' ability to deal with a single large buyer instead of two buyers. Applicants' Reply Comments at 39-40, Shelanski Decl. ¶ 48. SBC counters that the programming cos1 savings would derive from the exercise of market power, not rransactions cost savings. SBC Comments, Gertncr Decl. ¶ 40.

[105] Application, Pick Decl. ¶ 20; Applicants' Reply Comments, Shelanski Decl. ¶ 46. Applicants state that video programming costs are the largest single expense item. and "have increased at a substantially higher rate than inflation for many years." Application, Pick Decl. ¶ 18. Applicants claim that the merged entity's larger subscriber base may provide leverage to resist "supra-competitive" rate increases by video programming suppliers. Application. Pick Dccl. ¶ 20; Applicants' Reply Comments at 3X.

[106] Applicant's Reply Comments at 37

[107] Applicants' Reply Comments, Ordover Decl. ¶ 39; Letter from David L. Lawson, Sidley, Austin, Brown & Wood, LLP, to Marlene H. Dortch, Secretary, FCC (Aug. 9, 2002), at 4.

[108] CFA Comments at 10, 15-16; Qwest Comments at 14-15; SBC Comments at 6-7, 9-10; Verizon Commenrs at 13; Minority TV Comments at 4, 20.

[109] *Id.* This issue is also raised in the context of Internet programming content. For a discussion of how marker share relates to the incentives ot a vertically integrated MVPD to discriminate against non-affiliated programming content. see Rubinfeld, Daniel L. and Hal L. Singer, *Vertical Foreclosure in Broadband Access?*, 49 J. Ind. Econ. 299 (2001).

47. Applicants reply that foreclosure of unaffiliated programmers "can be competitively significant only if the integrated firm is sufficiently large that its upstream competitors' inability to sell to the firm's downstream division precludes the upstream competitors from covering their costs."[110] Applicants state thar the Commission has ruled that a cable MSO that accounts for less than 30% of MVPD purchases is not sufficiently large to pose a serious threat of anticompetitive foreclosure."' Applicants also state that the merged firm will own very little programming that could benefit from a foreclosure attempt, and will own many cable systems that would be harmed by a reduction in their supply of quality unaffiliated programming.[112]

48. *Discussion.* Section 613(f)(2)(A) of the Communications Act directs the Commission to set a horizontal ownership limit which ensures that no cable operator can unfairly impede the flow of video programming from the programmer to the consumer. Our 30% horizontal ownership rule is currently under review as part of a rulemaking proceeding commenced in September 2001, in response to the court's remand of the tule in *Time* ***Warner."'*** Despite the pendency of our horizontal ownership proceeding, Applicants have noted that their combined subscriber totals, excluding the TWE and TWI subscribers to **be** divested, are 27.02 million, which is 28.98 of the nation's 93.4 million MVPD suhscribers.[114] Applicants therefore urge that the proposed merger will not violate our remanded horizontal ownership rule.[115] Applicants further assert that they will "take all steps necessary to comply with any new cable horizontal ownership limit that may he adopted in connection with the pending Horizontal Ownership FNPRM proceeding."'[116]

49. Although our horizontal ownership cap has been reversed and remanded, and we have not yet determined what rules will best effectuate Congress' intent in enacting section 613(f) of the Communications Act, we remain obligated to ensure that the merged firm's national subscriber reach does not result in the harms to Competition and consumers that the horizontal cap is intended to prevent (*i.e.*, ensuring that no cable operator can unfairly impede the flow of video programming from the programmer to the consumer). Further, while the *Time* ***Warner*** court vacated one of the two bases upon which we attributed TWE to AT&T in the *AT&T-MediaOne* ***Order,*** the remaining basis for attribution of TWE to AT&T—our prohibition on the sharing or appointment of officers and directors—remains intact."' But for Applicants' proposal to insulate and divest TWE, AT&T's right to appoint directors to the TWE Board of Representatives, which will inure to AT&T Comcast upon closing of the merger, means that TWE would remain attributable to AT&T Comcast absent a waiver of the officers/directors de. Because Applicants have proposed to insulate the TWE Interest upon the merger's closing and to divest it thereafter, we evaluate the potential harms arising from increased subscriber reach without reference to TWE.

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[110] Applicants' Reply Comments at 44, citing Ordover **Decl.** ¶ 52.

[111] *Id.* (citing ***Horizontal Ownership Order*** ¶¶ **5,** *53)*

[112] *See id.*

[113] *See* ***generally Further Notice.***

[114] ***See*** Applicants Sept. 20, 2002, **Ex** Parte. **As** noted above, AT&T **has** 18.51 million total subscribers and Comcast **has** 8.51 million total subscribers. As of July 31, 2002. there *were* 93.4 million total MVPD subscribers nationwide. *See Kagan Media Money*, Aug. 27, 2002. at 7. The percentage ***of*** nationwide MVPD subscribers the merged firm would serve is calculated as follows: 27.02 million divided hy 93.4 million, equaling 28.9%.

[115] Application at 50.

[116] *Id.* at 49.

[117] 47 C.F.R. § 76.503 n.2(c). See para. 84. *infra* (discussing basis of attribution *of* TWE in the ***AT&T-MediaOne Order).***

50. *Monopsony* **Power.** We seek to determine whether the proposed merger would confer on the merged firm a degree of bargaining power that would enable it to dictate the terms and conditions of sale of programming and thereby impair programmers' ability to recover their costs without either reducing the quality or quantity of programming or shifting those costs to other MVPDs. In this endeavor, we turn to economic theory and available empirical evidence.

51. The relevant economic literature suggests that the outcome of merger activity, as it relates to bargaining position, depends on the relationship between firm size and bargaining power.[118] This may reduce the quality of programming produced by the programmer. or it could cause the programmer to exit the market if it is unable to cover its fixed costs.[119]

52. In addition to economic theory, the record in this proceeding includes some empirical analysis. In their experimental economics study, Bykowsky, Kwasnica. and Sharkey (2002) examine how changer. in horizontal concentration in the cable television industry may affect the flow of programming to consumers.[120] Employing laboratory methods, the authors created an experimental market that attempts to simulate a market in which national programming networks and MVPDs negotiate affiliate fees.[121] The study examined markets at three different concentration levels and incorporated a channel carriage constraint and the existence of "most favored nation" ("MFN")[122] terms as variables. The study does not provide any basis to conclude that a market in which the largest cable operator serves 29% of the MVPD subscribers would result in a reduction in the flow of programming to consumers.[123]

53. The record and some of the theoretical studies reviewed reflect the possibility that a large

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[118] *See and **compare*** Chipty, Tanseem and Christopher Snyder. The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry, ***The Review of*** *Economics and Statistics*, May, 1999, **81(2), 326-340** ("Chipty and Snyder"); *and* Raskovich, Alexander, Pivotal Buyers and Bargaining Position, Economic Analysis Group Discussion Paper 00-9, United States Department of Justice, Antitrust Division, October. **2001** ("Raskovich"): *with* Adilov, Nodir and Peter J. Alexander, Asymmetric Bargaining Power and Pivotal Buyers, Working Paper, Department of Economics, Cornell University, and the Federal Communications Commission, Media Bureau, September, **2002** ("Adilov and Alexander"). Chipty and Snyder and Raskovich construct bargaining models hased on the assumption of an ***equal*** division of profits berween program producers (sellers) and program distributors (buyera), which generates a worsening of a buyer's bargaining position as it merges and grows in size. Adilov and Alexander, however, construct bargaining models based on the assumption of ***unequal*** divisions of profirs. and conclude that large buyers enjoy greater gains from trade than smaller buyers.

[119] Another manifestation of MVPD bargaining power is the ability to demand that a programmer give the MVPD exclusive distriburion rights **as** a condition of carriage. ***But see*** 47 C.F.R. § 76.1301(b), which prohibits MVPDs From demanding an exclusive contract from a programmer for carriage. A large MVPD may be able to pay the programmer a premium that represents the revenues the programmer will forego by excluding other distributors. An increased subscriber reach may facilitate either outcome. We discuss the potential harm resulting from exclusive contracting below.

[120] *See* **Mark** Bykowsky, Anthony M. Kwasnica and William Sharkey, Federal Communications Commission Office of Plans and Policy, OPP Working Paper No. 35, *Horizontal Concentration* ***in rhe*** *Cable Television Industry:* ***An*** *Experimental Analysis* (rel. June 3, **2002**).

[121] Commentcrs criticized the study for its implementation, complexity, and lack of realism. ***See generally*** NCTA Comments. Shapiro, Carl, ***and*** John Woodbury. ***Cable*** *Television Subscriber Limits:* ***A*** *Critique*, July, 2002; AT&T Comments. Schotter Decl., July 2002; **SBC** Comments.

[122] MFN agreements between buyers and sellers of programming give the MFN buyer the right to purchase programming from the seller at terms at least equal to those of the buyer receiving the best deal.

[123] Completion of the study required establishing a set of parameter values that identify the key economic elements of the market participants' "business model." For programming networks. some of the key elemenrs were the level of programming costs and expected national advertising revenue. These parameter values were based on a sample of programming networks whose desired audience is national in scope.

firm with increasing numbers of subscribers may obtain or eventually gain the ability to unduly influence the market for video programming."' Applicants and commenters addressing the issue generally agree that the merged firm likely will pay less for programming post-merger than the individual Applicants currently pay."' However, there is no currently available evidence that determines a unique point at which a firm's subscriber reach allows the firm to exercise monopsony power over programmers.[126]

54. As we discuss further below, we analyze the proposed merger under the presumption that the TWE interest would be insulated upon closing and therealter divested. The merged firm would serve fewer than 30% of all U.S. MVPD suhscribers. Indeed, the number of combined subscribers attributable to AT&T and Comcast, excluding TWE, will comply with our remanded horizontal ownership cap, and Applicants have pledged to comply with any new horizontal ownership limit the Commission may adopt.[127] Any augmented bargaining power resulting from the combination of AT&T and Comcast would be insufficient to create public interest harms.

55. *Foreclosure of Unaffiliated National Programming.* Qwest, SBC and Verizon assert that the merged firm will be able to use its size to eliminate competition from unaffiliated national programmers by refusing to carry them on AT&T Comcast cable systems.[128] Combining the subscriber reach and programming interests of two or more MVPDs may increase the likelihood that denial of carriage of a rival's programming on the merged firm's systems could induce an existing programmer to exit the market or possibly deter a potential entrant. That is, such a merger could increase the ability to foreclose. The economic incentive to foreclose, however, necessarily depends on weighing the costs and the benefits of foreclosure. A vertically integrated cable operator would have the incentive to foreclose rival programmers only if its gains from the sale of affiliated programming to other MVPDs would offset the losses in subscriber revenues that might result if subscribers terminate service because of the operator's failure to carry a particular unaffiliated programming service.

56. The merged firm would reach fewer than 30% of the nation's MVPD subscribers and own a modest array of programming networks. As noted above, AT&T no longer has an interest in Liberty Media Corporation, which owns a large number of video programming services.[129] AT&T has also reduced to a nonattributable level its interest in Cablevision, which owns programming services, and

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[124] See CFA Comments at 10-11, 13-15: Qwesr Comments at 6-9, Haring Decl. at 8. 19; SBC Comments at 12-13, Gertner Vecl. ¶ 20: Verizon Comments at 11; *see also* Adilov and Alexander.

[125] CFA Comments at 10-11, 13-15; Qwesr Comments at 6-9, Haring Decl. at 8, 19; SBC Comments at 12-13, Gertner Decl. ¶ 20; Verizon Comments at 11; *see also* Applicants' Reply Comments at 39-40; Application at 32 n.51; Application, Pick Vecl. ¶ 4; Applicants' Reply Comments, Shelanski Decl. ¶ 48.

[126] This may be due in part to the unique dynamics involved between huyers and sellers of video programming when engaged in contract negotiations, which often encompass long-term commitments and include variables such as MFNs and huyers assuming some of the risks and costs of production. These negotiations, and the final agreed prices for programming, often remain confidential.

[127] We note that while the Court of Appeals in ***Time Warner*** expressed concern that the Commission did not sufficiently justify why the ownership level should not be set at a number higher than 30%, it never suggested that the Commission failed to justify setting the number as high as 30%.

[128] Qwesr Comments at 14-15; SBC Comments at 6-7, 9-10; Verizon Comments at 13. These commenters also assert that the purchasing power of rhe merged firm will allow it to choose a "winning' programmer, even if such programmer is unaffiliated with the merged firm, and then use its purchasing power to secure deep discounts or exclusive contracts. *Id.*

[129] *See* para. 13, *supra.* Among other programming networks. Liberty owns, in whole or in part, the Starz! movie channels. the various Encore channels (*e.g.*. Encore, Encore Action, Encore Mysteries), The Learning Channel. and the various Discovery channels (*e.g.*. Discovery Cliannel. Discovery Health. Discovery **Kids.** Discovery Science).

has sold all of its interests in four large programming networks.[130] AT&T has reduced its national programming ownership to three networks: E! Entertainment (10%), style (10%) and iNDEMAND (44%).[131] Comcast has ownership interests in eight national programming networks, three of which overlap with AT&T: E! Entenainment (40%, for a combined total of 50%), style (40%, for a combined total of 50%:). iNDEMAND (11%, for a combined total of 55%), QVC (SSS), the Discovery Health Channel (20%), the Golf Channel (91%), the Outdoor Life Network (100%). and the G4 Network (94%).[132] The total national networks owned would increase by only five.[133] Further, because the subscriber reach of the merged firm would be less than 30% of the national MVPD market, even with an attempred foreclosure strategy by the merged Firm, more than 70% of the MVPD market would still be available to unaffiliated programmers.[134] Therefore, hased on the limited number of programming services the merged firm would control after TWE is divested, and the national percentage of non-AT&T Comcast subscribers that could support unaffiliated programming, we find that the merger would not cnable Applicants to successfully foreclose unaffiliated national programmers.

57. *Foreclosure of Unaffiliated Regional Programming.* We also examine the potential harm to unaffiliated programmers who seek access to distribution channels for programming targeted lo regional or local audiences. CFA argues generally that allowing two monopolists to merge increases their dominance in regional distribution markets and could lead to higher prices, content discrimination and increased barriers to entry.[135] Applicants contend that foreclosure by an MVPD is competitively significant only if it lessens competition in some relevant market.[136]

58. For an MVPD to have the economic incentive and ability to foreclose unaffiliated regional programming several conditions must be met. First, the MVPD must have affiliated programming from which it could benefit by the reduction in programming competition. Second it must have the ability to foreclose. That is, it must have a large enough share of the relevant MVPD households that by choosing not to carry a competing programmer's offering, either a competing programmer would exit the market, or it would deter a potential entrant from entering. Finally the MVPD must have the economic incentive to do so. That *is,* any additional profits attained by the reduction of competition in the regional programming market must outweigh the lost earnings from carriage ***of*** the competing programming on the MVPDs own systems.

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[130] Qwesr Comments at 14-15; SBC Comments at 6-7, 9-10; Verizon Commenrs at 13. Among other programming networks, Cablevision owns. in whole *or* in pari, American Movie Classics, Bravo, the Independent Film Channel, and MuchMusic **USA.**

[131] ***See*** para. 14. ***supra***

[132] ***See*** para. 20, *supra*

[133] QVC, the Discovery Health Channel, the Golf Channel, the Outdoor Life Network, and the G4 Network

[134] The presence of competing MVPDs may further reduce a cable operator's incentive to choose programming for reasons other than consumer demand *(e.g.,* the operator's ownership of a programming network), because a cablc operator that selects programming on some other basis risks subscriber loss if more desirable programming is available via an alternative MVPD.

[135] *See* CFA Comments at 14-16, incorporating by reference CFA's Comments in our Cable Horizontal Ownership *Proceeding* at 127-38 (staring ihai "programmers [have] difficulty gaining access to MSO distribution" and that "[p]owerful cable MSOs have been able to prevent. restrict, or restructure programming networks, diminishing competition, diversity. and innovation. . . . in both national and local cable programming marketplaces"); ***see*** *also* Statement of CFA et al. lo Subcommittee on Antitrust, Business Rights and Competition, Senate Judiciary Committee. April 23, 2002 (appended to CFA Comments), ai 10-12.

[136] Applicants' Reply at 43-44 (noting that the minimum requiremenrs for competitive injury are (i) that access to the foreclosed portion of the market is essential to the economic viability of the excluded programmer: and **(ii)** that **the** foreclosing MVPD has significant programming interests to benefit from this foreclosure).

59. For the purpose of our analysis, we will define the MVPD's relevant market share by its share of MVPD households in the geographic footprint where the programming is delivered. A merger-specific issue will arise if the merger of AT&T and Comcast would result in a significant increase in the Applicants' post-merger market share above the threshold where foreclosure concern5 arise.

60. The merged entity will have attributable interests in regional programming targeted to regions their cahle systems serve. Currently, AT&T holds attributable interests in five regional programming networks: AT&T3: New England's TV Superstation (100% ownership interest), Empire Sports Network (33.33%), Fox Sports New England (50%), New England Cable News (50%), and Pittsburgh Cable News Channel (30%).[137] Comcast holds attributable interests in four regional programming networks: cn8, The Comcast Network (100%), which Applicants describe as one of the nation's largest regional cable networks; Comcast SportsNet (78%); Comcast SportsNet-MidAtlantic (100%); and Comcast Sports Southeast (72%).[138] In addition, the Applicants forecast that they will increase the production and delivery of local and regional programming, especially in former AT&T territories."' Within the distribution areas of these existing services either AT&T or Comcast already has significant concentrations of suhscribers.

61. The proposed merger will create or enlarge ownership concentrations in several metropolitan areas.]REDACTED.][140] In addition, documents submitted by the Broadband Service Providers Association ("BSPA") suggest that, when AT&T's partnership interests are taken into account, additional concentration may result in at least six other areas: (in the Albuquerque-Santa Fe DMA, the Kansas City DMA, the Indianapolis DMA, the Flint-Saginaw DMA, the Savannah DMA, and the Charleston DMA.[141] Applicants generally dispute the claim that the merger will create the additional system concentration identified by BSPA.[142] Specifically, they argue that AT&T does not manage these

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[137] Application at 25. Because AT&T's interest in Cablevision is no longer attributable, the regional programming network — including Fox Spons Net services, MSC Networks and other MSG channels, and News 12 Network —wned by Cablevision through its interest in Rainbow are also no longer attributable to AT&T. *See* para. 13, ***supra***; Application at ***20;*** Letter from Douglas G. Garrett, AT&T Broadband, to Marlene H. Dortch, Secretary, FCC (Oct. 3,2002) (discussing Empire Sports Network, L.P.).

[138] Application at 14. Comcast also produces Comcaat Newsmakers. Comcaat Local Edition, and other short-form puhlic affairs programs that appear twice hourly on channels carrying CNN Headline News. *Id.* at **15.** *See also* Section II.A.2, ***supra***.

[139] Application at 42; *see also* Section V.C., *infra*, (discussing the projected increase in supply of local and regional programming).

[140] *See* Letter from A Renee Callahan, Lawler. Metzger & Milkman. LLC, to Marlene H. Dortch, Secretary, FCC, (July 2,2002) ("Applicants' July 2, 2002, Response") at 5 and Attachment 3 (responding *to* Documenrand Information Request by the Chief, Industry Analysis Division. Media Bureau, FCC (June 11, 2002) ("June 11, 2002, Information Request")). The lune 11, 2002, Information Request defined a cluster as "two or more cable systems which are close in geographic proximity and share personnel, management, marketing and/or technical facilities." *Id.* at IQ.B1. **[REDACTED.]** In this Order, **"REDACTED"** indicates confidential or proprietary information submitted pursuant to the protective order in this proceeding. *Applications **for** Consent to **the Transfer of Control of Licenses from Comcast Corporation** and **AT&T Corp., Transferors, to AT&T** Comcasl **Corporation, Transferee,*** DA 02-734 (rel **Mar.** 29, 2002) *("Protective **Order").*** The unredacted text is included in the Confidential **Appendix.** which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgements of the protective order. Qualified represenratives who have not yet signed the required acknowledgement may do so in order to obtain the Confidential Appendix.

[141] *See* Letter from BSPA to Marlene H. Dortch, Secretary, FCC (Oct. 2, 2002) ("RSPA Oct. 2 Ex Parte") at Attachment A ("BSPA Map").

[142] *See* Letter from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Oct. 11, 2002).

non-consolidated systems, nor share personnel, management, marketing or technical facilities with those systems.[143] Applicants also claim that, with minor exceptions, Comcast's cable systems in Michigan, Indiana, New Mexico, Georgia, Florida, and Kansas do not serve the same geographic areas served by the AT&T non-consolidated systems.[144]

62. Although regional foreclosure is a novel issue in the merger context, in the rulemaking context, the Commission has balanced the benefits of clustering—such as regional programming, upgraded cable infrastructure and improved customer service—with the likelihood of' anticompetitive harm.'" In its orders on cable horizontal ownership, the Commission declined to adopt regional subscriber limits because the record in those proceedings did not establish that any anti-competitive effects of clustering outweighed its benefits.[146]

63. Based on the record before us, we conclude the merger is unlikely to result in public interest harms arising from foreclosure of regional programming. Both of the merging entities already have significant presence in various regions. including regions served by their programming affiliates. In all except one of the regions served by affiliated programmers, the merger's effect on the Applicants' subscriber share would he *de minimis*.[147] In the Southeast region, where post-merger concentration would increase more significantly, it would not exceed 25% of total subscribers in the relevant region.[148] To the extent subscriber concentration is materially increased in areas served by regional programmers, the merger. by combining AT&T's and Comcast's subscriber share and/or affiliated program services. could

[143] *Id.*: *see also* Application at 18-21 (explaining that AT&T Broadband generally divides its interests in cable systems into owned and operated systems, consolidated systems (in which AT&T has a greater than 50% but less than 100% inrerest), and non-consolidated systems (in which AT&T has a 50% or less interest)).

[144] Letter from Michael H. Hammer, Willkie Farr and Gallagher, to Marlene H. Dortch, Secretary, FCC, (Nov. I, 2002) ("Applicants' Nov. 1, 2002 Ex Pane").

[145] *Implementation of Sections 11 arid 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, 8572-73 ¶¶ 16-17 (1993) (confirming the Commission's authority to adopt regional subscriber limits and concluding that there was no basis in the record for imposing regional limits that could reduce invesrment in the developmenr of regional programming, upgraded cable infrastructure and improved customer service).

[146] *Implementation of Section 11(c) of rhr Cable Television Consumer Prorecrion and Competition Act of 1992, Horizontal Ownership Limits*, 14 FCC Rcd 19098, 19125 ¶ 63 (1999).

[147] See Letter from A. Renee Callahan, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, Secretary, FCC, (Nov. 5. 2002) ("Applicants' Nov. 5, 2002, Ex Pane") at 2 (showing that increased subscriber shares in the regions served by Fox Sports New England, Comcast Sports Mid-Atlantic, and Comcast SporrsNet (Philadelphia) would increase by no more than 3% over the pre-merger subscriber share of the Applicant that owns the programming interest); *see also* Applicants' July 2, 2002. Response at Comcast-FCC-B.1-0000001; BSPA Map (indicating that no additional concentration would result in the region served by Empire Sports); Letter from Douglas G. Garrett, AT&T Broadband, to Marlene H. Donch, Secretary, FCC (Ocr. 3, 2002) (providing information on Empire Sports Network, L.P.). The AT&T and Comcaat systems that are within the footprint of Fox Sports New England are also in the area served by New England Cable News. See *NCTA's Cahle Developments 2002*, at 186. Thus, the merger's effect on regional concentration in this area would be *de minimis*. The merger will not result in any additional concentration in the region served by Pittsburgh Cable News Channel. See Applicants' July 2. 2002, Response at Comcast-FCC-B.1-0000001; BSPA Map; Letter from Michael H. Hammer, Willkie Farr & Gallagher, *to* Marlene H. Dortch. Secretary. FCC (Nov. 8, 2002) ("Applicants' Nov. 8 Ex Parte"). The region served by cn8 is roughly contiguous with the area served by Comcast SportsNet (Philadelphia), except that cn8 also serves Maryland. Because AT&T has no subscribers in Maryland, the merger-related increase in subscriber concentration in this area also would be *de minimis*. See Letter from Michael H. Hammer, Willkie Farr & Gallagher. to Marlene H. Donch, Secretary, FCC (Nov. 7. 2002) at 2 ("Applicants' Nov. 7, 2002, Ex Parte"); See Applicants' July 2, 2002, Response at Comcast-FCC-B.1-0000001; BSPA Map.

[148] *See* Applicants' Nov. 7, 2002, Ex Parte (showing post-merger subscriber shares for Comcast Sports Southeast).

increase their incentive and ability successfully to pursue foreclosure strategies. The record does not demonstrate, however, that the additional concentration created by the merger will materially alter the incentive and the ability of the merged entity to pursue foreclosure.[149] We cannot conclude, therefore, that the increased concentration levels are sufficiently large that profits from any reduction in competition likely would outweigh lost earnings. Nor does the record demonstrate that any foreclosure strategy AT&T Comcast may attempt would materially impair unaffiliated programmers' ability to compete. Moreover, the Commission's rules implementing section 616 of the 1992 Cable Act provide an avenue for aggrieved video programmers and **MVPDs** to obtain relief from discrimination on the basis of affiliation."'

64. In the Commission's recent *Program **Access Order*** extending the exclusivity prohibition on satellite cable programming, we noted that "system 'swaps' and purchases over the course of the last decade have dramatically changed the shape of the cable television industry in terms of local or regional market 'clusters,'" which we defined as "sets of commonly owned cable systems within contiguous geographic market areas."[151] To the extent that there are general concerns about the effect of an industry trend toward increased clustering, we have an ongoing rulemaking proceeding regarding cable ownership that may provide us with an appropriate vehicle to assess the potential benefits and harms of such regional concentration.[IS2] In that regard, we note that section 613(f)(2)(B) requires the Commission to ensure, among other public interest objectives, that cable operators affiliated with video programmers do not favor such programming in determining carriage on their cable systems.[153] In the ongoing proceeding, we can re-examine the extent to which clustering facilitates the creation of regional programming and the extent *to* which it increases the potential for foreclosure of unaffiliated regional programmers, as well as any other public interest benefits and harms.

65. ***Conclusion.*** We find that the merger, as proposed, will not enable AT&T Comcast to exercise monopsony power over programming markets or raise rival **MVPDs'** costs. We further fd that the merger will not harm diversity or competition in the programming market by enabling AT&T Comcast to pick winners and losers in the programming market through foreclosure of programmers from carriage. Because we are relying on the proposed insulation and divestiture of TWE as a basis for our finding that the merger will not create harms in the video programming market, we are not attempting to determine the extent of potential harm that would result absent the insulation and divestiture of TWE.

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[149] No commenter has shown that this concentration level will enable AT&T Comcast **to** foreclose any particular regional programmer.

[150] Section 76.1301(c) of the Commission's rules prohibits the merged entity from "unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly **by** discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms or conditions for carriage of video programming provided by such vendors," while section 76.I302 authorizes video programming vendors and MVPDs to file program carriage complaints with the Commission. 47 C.F.R. § 76.1301(c) and § 76.1302; ***see also Implementation of Sections I2 and 19 of rhe Cable Television Consumer Prorecrion and Cornperition Act of 1992***, 9 FCC Rcd 2642 (1993). On reconsideration of this order, the Commission amended 47 C.F.R. § 76.1302 to specifically afford standing to MVPDs aggrieved by carriage agreements between other MVPDs and programming vendors that violate section 616 of the 1992 Cable **Act** and the Commission's rules. ***Implementation of the Cable Television Consumer Protection and Competition Acr of 1992, Memorandum Opinion and Order,*** 9 FCC Rcd 4415, 4418-19 ¶ 24 (1994).

[151] *Program Access **Order.*** 17 FCC Rcd at I2133 ¶ 22.

[152] *Further Notice,* 16 FCC Rcd at 17322 ¶¶ 10-11. Our *Further Notice* on cable horizontal and vertical ownership limits distinguished between general entertainmeni programming and niche programming. such as regional sports programming, noting that such regional programming would have a much narrower geographic market, and generally sought comment on the Commission's conceptualization of the market structure as well as the regularory implications that should follow. *Id.*

[153] 47 U.S.C. §613(f)(2)(B).

C. TWE Insulation and Divestiture Conditions

66. Absent insulation, the merged firm's interest in TWE would heighten the risk of harm to competition in the video programming market. Nevertheless, because we find that the proposal submitted by the Applicants (the "TWE Proposal")[154] sufficiently insulates the TWE Interest, we will not treat TWE as an attributable interest for purposes of our analysis of potential harms in this or other arenas, such as MVPD competition. Internet access. or ITV. Such analysis would have been required had the Applicants failed to advance an acceptable means of insulating the TWE Interest, and could be required in the future if the merged entity requests our approval to alter any element of the TWE Proposal or alter any of the conditions wc impose herein.

(i) TWE Insulation and Divestiture Proposal

67. In the Public Interest Statement filed with the Application, the Applicants state that AT&T plans to divest the TWE Interest prior to the closing of the proposed merger.[155] The Applicants state that, alternatively, if AT&T is unable to divest its TWE Interest by the closing date of the merger, the TWE Interest will be insulated consistent with our attribution rules until the interest can be divested.[156] By letter dated August 8, 2002, the Applicants specified a proposed means of insulating the TWE Interest through a combination of safeguards and a divestiture trust.[157]

68. ***Proposed Safeguards Relating to Video Programming.*** Applicants propose that Paragrapha 3-5 of the ***AT&T-MediaOne*** Safeguards Relating to Video Programming continue to govern AT&T Corncast's relationship with TWE after the merger closes.[158] Modified to fit the present transaction, these safeguards (the "Modified TWE Safeguards")[159] are as follows:

1. No officer or director of AT&T Corncast[160] shall also be an officer or director of TWE.[161]

2. No officer, director. or employee of AT&T Corncast shall. directly or indirectly, influence or attempt to influence. or otherwise panicipate in, the management or operation of the

[154] *See* Letter from **Betsy** J. Brady, AT&T Corp. and James **R.** Colrharp, Comcast Corporation to W. Kenneth Ferree, Chicf, Media Bureau (Aug. 8, 2002) ("TWE Proposal"). We sought comment on the **TWE** Proposal. ***See Media Bureau Seeks Comment on Proposed Insulation and Divestiture of AT&T's Interest in Time Warner Entertainment, LP.*** Public Noticc, DA 02-1987 (rcl. Aug. 9, 2002).

[155] Application ai 4, 19. 53-64

[156] Application **at** 4, 61

[157] ***See generally TWE Proposal.***

[158] ***See*** TWE Proposal at 1-2; Letter from Arthur R. **Block,** Senior Vice President & General Counsel, Comcast Corporation. and Mark *C.* Rosenblum, Vice President - Law, AT&T Corp., to Marlene **H.** Dorrch. Secretary. FCC (Sept. 30, 2002).

[159] ***See AT&T-MediaOne Order,*** 15 FCC Rcd at 9899, Appendix B

[160] AT&T Corncasr is defined as "AT&T Comcast, all **of** its wholly-owned subsidiaries, and any entities controlled hy AT&T Comcast, but shall not include INDEMAND." ***See*** Appendix B attached hereto.

[161] TWE is defined to include the TWE Inreresr and interests that AT&T Comcast will have in certain affiliates *of* AOL Time Warner upon the restructuring of TWE. ***See*** Appendix B attached hereto Such interests are described in detail in our description of the trust proposal and TWE Restructuring Agreement below.

Video Programming"[162] activities of TWE. In particular, no member of the TWE Board of Directors appointed by the Trustee shall be involved in the following matters:

a) the decisions of TWE regarding which Video Programming services are purchased for or carried on TWE's cable systems;
b) negotiation of the prices paid by TWE for Video Programming carried on TWE's cable systems;
c) setting the schedule for rollout of Video Programming by TWE's cable systems;
d) marketing by TWE of Video Programming carried on TWE's cable systems;
e) setting the budget fur the Video Programming operations of TWE's cable systems (except that AT&T may be involved in setting the overall TWE budget for Video Programming operations provided that AT&T's access to TWE budget information does not include information concerning individual budget components of TWE's Video Programming operations, e.g., personnel, overhead, marketing. and program purchasing);
f) selecting the electronic programming guide used by TWE's cable systems;
g) the hiring, firing, or supervising of TWE employees directly involved in the Video Programming activities of TWE's cable systems; or
h) assessing the performance of any Video Programming service carried by TWE's cable sysrems.

3. AT&T Comcast may not, directly or indirectly, receive information from TWE regarding the price, terms. or conditions negotiated for the carriage of Video Programming on the TWE cable systems. nor provide information tu TWE regarding the price, terms, and conditions negotiated for the carriage of Video Programming on AT&T Comcast cable systems. AT&T Comcast may not obtain from any Video Programming vendor a volume discount or other favorable terms and conditions as a result of TWE's purchase of Video Programming for, or carriage on, TWE's cable systems.[163]

69. Certain enforcement mechanisms, including regular reponing and the establishment of a compliance officer, were associated with the safeguards prescribed by the *AT&T-MediaOne Order.*[164] The Modified TWE Safeguards provide that AT&T Comcast will designate a senior manager to oversee compliance with the safeguards. Until the TWE Interest is divested, AT&T Comcast also will file compliance reports with the Media Bureau every six months.

70. *Trust Proposal.* AT&T proposes to place the TWE Interest in two trusts (the "Trusts"). Final drafts of the proposed trust agreements were filed with the Commission on October 25,2002 (each a "Trust Agreement")."[165] The Trust Agreement provides that if any additional direct or indirect interests in

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[162] "Video Programming" means video programming as defined in 47 U.S.C. § 522(20) and the Commission's implementing regulations as of January 1. 2002. *See* Appendix B attached hereto.

[163] The Trust Agreement vests the responsibility to appoint members to the TWE Board of Representatives in the Trustee, subject to certain limitations which will be described further heluw in our discussion of the trust proposal.

[164] *See AT&T-MediaOne* *Order,* 15 FCC Rcd at 9902-05

[165] *Sea* Agreement and Declaration of Trust (filed Oct. 25, 2002). The Trust Agreement states that MediaOne of Colorado. Inc. ("MOC"), *a* wholly-owned subsidiary of AT&T Broadband, holds *a* 2.86% interest in TWE. MediaOne TWE Holdings ("MOTH"), a wholly-owned subsidiary of MOC, holds a 24.78% interest in WE. Prior to the closing of the merger of AT&T and Comcast. the Interest in TWE now held by MOC will be transferred to a

(continued....)

TWE are acquired by AT&T Comcast or any of its subsidiaries, such interests will be delivered to the Trustee and will become subject to the Trusts.[166] The Trusts will be materially identical in form. The purpose of the Trusts is to divest the TWE Interest over the term of the Trusts. A trustee (the "Trustee"), who will be the same for each of the Trusts, will have the exclusive power and authority to manage the trust assets and to exercise AT&T Comcast's rights relating to the TWE Interest, including all voting, director appointment, consent, and management rights under the TWE Partnership Agreement.[167] The Trustee will be appointed by AT&T Comcast after notice to and with the prior approval of the Media Bureau, and may not be an individual with a personal, familial or business relationship with AT&T Comcast or its affiliates, including its officers, directors, managers, agenrs or employees.[168] The Trustee may retain independenr advisors provided that their fees are reasonable, and provided that they do not have business relationships with AOL Time Warner.[169] AT&T Comcast also may retain advisors, who shall not be the same advisors appointed by the Trustee, including accountants, attorneys, investment bankers, and managing Underwriters, to assist the Trustee's advisors with the TWE divestiture.[170]

71. The Trust Agreement will prohibit communications between AT&T Comcast and the Trustee, with some exceptions. The Trustee will not be permitted to provide any information to AT&T Comcast concerning the operation or management of TWE or any cable system in which TWE has an interest, except for information needed to comply with Securities and Exchange Commission or Internal Revenue Service requirements.[171] The Trustee will have access to all of AT&T Comcast's personnel, books, records and facilities relating lo the TWE Interest. The Trustee may communicate with AT&T Comcast "to facilitate divestiture" of the TWE Interest.[172] The Trustee also is required to provide periodic reports to AT&T Comcast, with a copy to the Media Bureau, describing the Trustee's efforts to

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newly formed Delaware limited liability company that is indirectly wholly-owned by MOC ("LLC1"). MOTH will be indirectly wholly-owned by MOC, and the interest in TWE then held by MOTH will he transferred to a newly Formed Delaware limited liability company that is wholly-owned by MOTH ("LLC3"). At closing. LLC1 and LLC3 will each be convened into Delaware business trusts ("Trust I" and "Trusr III", respectively). MOC. or a wholly-owned subsidiary of MOC, will be the grantor of the MOC Trust. and MOTH will be the grantor of the MOTH Trust. If the TWE Restructuring closes, Trust 111 will dissolve hy merging into MOTH. Simultaneously with the dissolution of Trust 111, a new trust will be formed immediately above MOTH in the corporate ownership chain by convening a Delaware limited liability company, indirectly wholly-owned hy MOC, into a Delaware business trust ("Trust II"). The effect of the closing of the TWE Restructuring Transaction upon the trust structure set up at the closing of the merger will be to replace Trust III with Trust II. *Id.* at 1-5. The Applicants filed the agreements for Trusts II and III on Oct. 31, 2002. Copies of the executed trust agreements will he filed with the Commission no later than 14 days after the merger closing. *See* Letter from Michael H Hammer, Willkie, Farr, & Gallagher. to Marlene H. Donch, Secretary, FCC (Nov. 7, 2002).

[166] *Id.* § 2(d).

[167] Upon the closing of the AT&T Comcast merger, the directors appointed to the TWE board by AT&T will resign. The Trustee will then exercise any right to appoint replacement directors when, in the Trustee's sole judgment, doing so is necessary or required to protect the value of the interests held in the Trusts. Letter from Charles W. Logan. Lawler, Metrger & Milkman, to Marlene H. Dorrch, Secretary, FCC (Aug. 28, 2002) at 3 ("Applicants' Aug. 2X. 2002, Ex Parte"); Trust Agreement at § 4.

[168] Trust Agreemenr at § 8. AT&T Comcasl may not remove or replace the Trustee at will, and the selection of a replacement Trustee also will be subject to the notice and approval process. *Id.* § 9.

[169] *Id.* § 10.

[1711] Trust Agreement § 10 (b). The Trustee may use advisors who have previously served as advisors to AT&T Coincast. *Id.* at § 10(a).

[171] Trust Agreement § 12 (a)(i).

[171] Trust Agreement § 12 (b) and (d). Generally all material communications must he in writing, or, if oral, must be reduced to writing. *Id.* ¶ 12 (d).

divest the TWE Interest."' The Trusts also will permit communications between the Trustee and AT&T Comcast regarding the Trustee's fiduciary duty."' To ensure that advisors do not share information that AT&T Comcast and the Trustee are prohibited from communicating to each other directly, the advisors will be made aware of and will be subject to similar restrictions on communications."'

72. The Trust Agreerncnt establishes an initial five-year period for divestiture of the TWE Interest.[176] During the five-year period, the Trustee will have the authority and will be directed to pursue such registration rights as are availahle in a manner intended to maximize the value received hy AT&T Comcart (a "Public Sale")."' At any point during the five-year period. AT&T Comcast may propose an "Alternate Disposition" of some or all of the TWE Interest to the Trustee."' An Alternate Disposition may result in: (1) cash consideration; (2) non-cash consideration, including "Restricted Consideration," which is an interest in AOL Time Warner or an entity in which AOL Time Warner has an attributable interest; and/or (3) a "Derivative Transaction" in which all or a portion of the economic interest in the TWE Interest is converted to cash, while the legal and record ownership such interest remains in the Trusts.[179] If an Alternate Disposition is proposed by AT&T Comcast. the Trustee is required to use its reasonable best efforts to effect the Alternate Disposition, which may include discontinuing efforts to effect a Public Sale for a period of time.[180] If an Alternate Disposition yields Restricted Consideration, the Restricted Consideration shall remain in and be subject to the Trusts.[181]

73. Soon after the Applicants submitted the TWE Proposal, the Applicants reached an agreement with AOL Time Warner (the "TWE Restructuring Agreement").[182] The Applicants have stated that the TWE Restructuring Agreement will facilitate their divestiture of the TWE Interest, but they do not request that we condition the merger on consummation of the TWE Restructuring Agreement.'"

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[173] Trust Agreement § 12(b).

[174] Trust Agreement § 12(c).

[175] Trust Agreement § 10(c). Similarly. neither AT&T Comcast nor its affiliates may communicate directly or indirectly through their advisors regarding operation or management of TWE or any cable system in which TWE has an interest. *Id.* § 12(a).

[176] Trust Agreement § 5(b).

[171] Trust Agreement § 5. Other than in certain specified circumstances, the Public Sale is the only means by which the Trustee is permitted to dispose of the TWE Interest at any point during the five-year period. *Id.* § 5(b).

[178] Trust Agreement § 5(c).

[179] Trust Agreement § 5(c). If the Alternate Disposition is a Derivative Transaction. the Trustee cannot take any action during the five-year period to effect a Public Sale of the pan of the TWE Interest which is subject of that transaction. *Id.* A derivative transaction is one where the TWE Interest will be "monetized" in a transaction or series of transactions which may be in a number of forms, including a forward sale, a repurchase agreement or a securitization of the interest. Whatever the form, essentially no less than *80%* of the beneficial interest is transferred. for a fixed period of rime. in return for cash.

[180] *Id.* at § 5(c).

[181] *Id.* at § 5(e).

[182] ***See Restructuring Agreement by arid Among AOL Time Wurrier, Inc., AT&T* Corp. *and Comcast* Corporation,** dated as of August 20, 2002 ("TWE Restructuring Agreement"). The TWE Restructuring Agreement was filed with the Commission on August 23, 2002. Certain exhibits associated with the TWE Restructuring Agreement were tiled with the Commission on Septemher 13, 2002.

[183] *See* AT&T Corp. and Comcast Corporation. ***AOL Time Warner, AT&T and Comcast Agree to Restructure Time Warner Entertainment Partnership*** (press release). Aug. 21, 2002 ("TWE Restructuring Press Release"); Letter to W. Kenneth Ferree. Chief, Media Bureau from Betsy J. Brady, AT&T Corp., and James R. Coltharp. Comcast Corporation (Sept. 20. 2002) at 5.

Because the TWE Restructuring Agreement provides one possible example of the types of transactions that will be permitted under the Trust Agreemenr, we will briefly describe the TWE Restructuring Agreement here. However, we do not condition the merger on the execution of TWE Restructuring Agreement, bur only the TWE Proposal itself.

74. The Applicants anticipate that the transactions related to the **TWE** restructuring (collectively. the "TWE Restructuring Transactions") may not close until 2003.[184] For purposes of the Trust Agreement, the TWE Restructuring Agreement would constitute an Alternate Disposition, which would result in AT&T Comcast's receipt of cash consideration, as well as Restricted Consideration, which shall remain subject to the Trusts. Under the TWE Restructuring Agreement, TWE would transfer to AOL Time Warner all of the TWE programming interests. In exchange, AOL Time Warner would transfer those cable assets currently held outside of TWE into a newly formed company, Time Warner Cable, Inc. ("TWC"). The parties to the TWE Restructuring Agreement contemplate that TWC will become a publicly traded company and, subject to market conditions, they plan to conduct an initial public offering ("IPO") soon after the restructuring.[185] TWC will have a wholly-owned subsidiary, to be called TWI Cable, Inc. ("TWIC"), and will own 95.3% of a restructured TWE ("TWE2").[186] AT&T Comcast will hold the remaining 4.7% interest in TWE2.[187] TWIC and TWE2 will have cable assets, but no programming assets. In exchange for its TWE Interest, AT&T Comcast would receive the following consideration: $1.5 billion of AOL Time Warner common stock; $2.1 billion in cash; a 17.9% interest in TWC, and a 4.7% interest in TWE2.[188] AT&T Comcast's ownership of AOL Time Warner common stock and its interests in TWC and TWE2 will be considered Restricted Consideration and will be subject to the Trusts.

75. It' the TWE Restructuring Transactions close, AT&T Corncast's combined interests in TWC and TWE2 would give it a 21% interest in AOL Time Warner's cable assets.[189] The parties to the TWE Restructuring Agreement anticipate that TWC will have a six-member board of directors, and will have two classes of common stock—Class A shares and Class B shares." Through one of the Trusts, AT&T Comcast will hold Class **A** shares.'" For purposes of electing directors, Class **A** shareholders will be entitled to one vote per share, while Class B shareholders will be entitled to ten votes per share.[192] For purposes of all other matters, the shares of the Class A and Class B stock vote as a single class, with one vote per share.[193] AT&T Comcast will therefore have the right to elect directors, but the Trustee, pursuant to the terms of the Trusts, will exercise that right.'" Subject to acting reasonably, AT&T

[184] AOL Time Warner, AOL Time Warner Announces Restructuring of Time Warner Entertainmenr Company (press release), Aug. 21, 2002 ("AOL TWE Release").

[185] **AOI.** TWE Release. ***See*** *also* AOL Time Warner, *TWE Restructuring Summary* (slide presentation) Aug. 21, 2002. available at http:/aoltimewarner.com/investors/slides_twe_restruct/ (visited **Sept.** 4, 2002) ("TWE Restructuring Presentation").

[186] TWE Restructurinp Presentation, Slide 4

[187] *Id,*

[188] *Id.*

[189] TWE RestructuringPresentation, Slide 3

[190] TWE Restructuring Presentation. Slide 6.

[191] *See* Letter from Charles W. Logan, Lawler, Metrper & Milkman, to Marlene H. Dortch. Secretary, **FCC (Sept.** 30, 2002) at 4. AOL Time Warner will control each class of TWC shares. TWE Restructuring Presentation, Slide 6.

[192] ***See*** Letter from Charles W. Logan, Lawler, Metzger & Milkman. to Marlene H. Dortch, Secretary. FCC (Sept. 30, 2002) at 4.

[193] *Id.*

[194] Applicants' Aug. 28, 2002, **Ex** Parte at 3.

Comcast also will have the right to approve 50% of the nominees for independent directors during the period after the restructuring and prior to any TWC IPO.[195] Again, pursuant to the terms of the Trusts, the Trustee will exercise this right.

76. Following an Alternate Disposition under the Trust Agreement, such as the TWE Restructuring Transactions, and for the remainder of the five-year period, the Trustee will retain the power to dispose of the restructured TWE Interest that is Restricted Consideration through a Public Sale.[196] Under the Trust Agreement, the Trustee may not initiate a Public Sale pending the closing of the TWE Restructuring Transactions (the "Restructuring Closing").[197] After the close of TWE Restructuring Transactions, the Trustee is directed to pursue a Public Sale, subject to the following conditions: (1) the Trustee may not take any action to dispose of the AOL Time Warner stock for a 90-day period following the Restructuring Closing; (2) the Trustee may not take any action to initiate a TWC IPO during the 180-day period following the Restructuring Closing; and (3) the Trustee may not effect a private sale of the TWE2 interest for at least three years, but may do so after such period has expired.[198]

77. If the TWE Interest and all Restricted Consideration is not fully divested at the end of the five-year period. the Trustee will thereafter have the authority and be directed to dispose of such remaining interest in any manner the Trustee chooses as quickly as possible, and in all events within six months thereafter.[199] The Trusts will terminate upon the occurrence of the first of: (i) divestiture of the TWE Interest and payment of all proceeds to AT&T Comcast; or (ii) AT&T Comcast ceasing to hold any beneficial interest in the assets held in the Trusts.[200] We analyze the TWE Proposal below.

(ii) Analysis of TWE Proposal

78. The application of conditions modeled on Paragraphs 3-5 of the AT&T-MediaOne video programming safeguards to AT&T Comcast's relationship with TWE, as well as its successor interests in TWC and its subsidiaries, will satisfactorily mitigate the risks of harm to the video programming market that may result from AT&T Comcast's TWE Interest.[201] For example. through the TWE partnership, the two cable operators (AT&T Comcast and Time Warner Cable) could share information about the prices, terms. and conditions of their respective programming contracts, providing each MSO with enhanced bargaining power over programmers. The operators also might attempt to negotiate programming contracts jointly to secure volume discounts based on their combined national subscribership, rather than their respective national subscriber shares. The condition, modeled on Paragraphs 3 and 4 will prohibit the merged firm from participating in TWE's video programming decisions, which significantly reduces the chance that the two MSOs will exchange the types of information or engage in the kinds of negotiations that would allow them increased bargaining power over programmers. In addition. the

[195] *Id*

[196] Trust Agreement § 5(f).

[197] Trust Agreement § 5(g) (staying the registration rights process provided for in the TWE Limited Partnership Agreement between the merger closing and the closing of the TWE Restructuring Transactions).

[198] Specifically. the Trust Agreement permits the Trustee to effect a private tale of the TWE2 interest only after: (a) an initial two-year period has elapsed: and (b) AT&T Comcast has not instructed rhe Trustee tn effect a Private Sale for a rhree-year period from the date of the Restructuring Closing.

[199] Trust Agreement § 5(i).

[200] Trust Agreement § 13. If any trust assets are not disposed of by the end *of* the six-month period following the five-year period, the Trusts will continue until the Commission either approves the dissolution of the Trusts or the remaining assets are **sold.** Trust Agreement § 13(a)(ii).

[201] As the Appendix specifies, these safeguards will apply to AT&T Comcast's relationship with TWE or any successor entity that is affiliated with AOL Time Warner.

condition modeled on Paragraph 5 directly prohibits AT&T from receiving information from TWE regarding the price, terms and conditions TWE negotiates for the carriage of video programming, and prohihits AT&T from providing such information to TWE. This prohibition also prevents AT&T from obtaining volume discounts or other favorable terms or conditions from any programmer as a result of TWE's purchase of video programming, or for carriage on TWE systems. We hold that application of these limitations to AT&T Comcast's relationship with TWE, combined with other elements of the TWE Proposal, will adequately protect against the harms described above. Accordingly, we will condition our approval of the Application on compliance with safeguards and related enforcement mechanisms modeled on those contained at Paragraphs 3-5 of Appendix B of the *AT&T-MediaOne **Order.*** These safeguards and enforcement mechanisms, modified to reflect the current transaction, are attached as Appendix B hereto.

79. As reflected in the Trust Agreement, we also will impose a condition that prohibits communications concerning the prices, terms, and conditions of carriage of video programming on the systems owned by KCCP and TCP. Application of these safeguards to KCCP and TCP, which are operated by TWE, will ensure that they are nor vehicles for the prohibited exchange of information or for securing favorable terms and Conditions from programmers. Under the Trust Agreement, these two partnerships will be subject to a prohibirion similar to that in the safeguard modeled on Paragraph 5 of the ***AT&T-Media One*** conditions.[202]

80. We recognize that the proposed Trusts differ in certain respects from trusts we have previously found acceptable for purposes of insulating an otherwise attributable interest. For example, the Trust Agreement will permit the merged firm to play a role in negotiating with potential buyers, and allows AT&T Comcast to restrict the Trustee's ability to execute a Public Sale if its negotiations yield an opportunity for a private sale. The proposal also differs from divestiture trusts we have previously approved because it is more in the nature of a deferred divestiture trust, as the Trust Agreement allows for Derivative Transactions, which make it likely that full divestiture will not occur until the end of the five-year period.[203] By contrast, wc normally require that the Trustee have complete control over the price, terms, and conditions of the sale of assets held in trust.[204] In addition, the length of time that the TWE Interest and successor interests will remain in the Trusts is longer than the time frame we typically allow in approving divestiture trusts involving wireless or broadcast licenses.[205] It is not, however. unprecedented.[206]

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[202] The Trust Agreement prohibits communication between AT&T Comcast and each partnership concerning the price. terms or conditions of carriage of video programming on the systems of the partnerships or AT&T Corncast. *See* Trust Agreement § 11

[203] ***See*** note 179, ***supra*** (describing derivative transactions).

[204] *See 1998 **Biennial Regulatory Review of Spectrum Aggregation** Limirs **for Commercial Mobile Radio Services,*** 15 FCC Rcd 9219, 9269 ¶ 117 (1999) ("***1998 Biennial CMRS Review"); 2000 Biennial Regulatory Review of Specrrum Aggregation Limits for Commercial Mobile Radio Services***, 16 FCC Rcd 22668, 22711 ¶ 95 (2001): 47 C.F.R. §§ 20.6(e)(4)(i). ***See** also **Twentieth Holdings Corp. (Transferor) and Edward W. Brooke and Hugh** L. **Curry, Trustees (Transferee)***, 4 FCC Rcd 4052, 4054 ¶ 12 (1989) ("***Twentieth Holdings"***) (requiring revisions to divestiture trust terms to remove beneficiary's right to approve of financial terms and conditions of sale of assets).

[205] In the broadcast and wireless contexts, the time period we permit for divestiture trusts is usually no more than six months. ***See. e.g., Applications of AMFM, Inc., Transferor. and Clear Channel Inc., Transferee,*** 15 FCC Rcd 16062, 16087 ¶ 26 (2000) (use of a divestiture trust to comply with local radio ownership rules for a limited six-month period); ***1998 Biennial CMRS Review***, 15 FCC Rcd at 9269 ¶ 117 (1999) (use of six-month divestiture trusts to comply with CMRS cap).

[206] In ***AT&T-TCI***, we mandated the divestiture of TCI's interest in Sprint PCS ("Sprint") as a condirion of merger approval. ***AT&T-TCI Order,*** 14 FCC Rcd. at 3207-3213, ¶¶ 97-112. There, the Commission found that a five-year divestiture period was justified because it would avert potential harm to competition in the provision of wireless

(continued....)

81. The Applicants contend that their proposed five-and-a-half-year divestiture period is consistent with Commission precedent, and that our approval of the term will serve the public interest.[207] We recognize that the nature of the TWE Interest, including its size,[208] its diverse assets,[209] and the limited governance and management rights associated with the interest,[210] makes divestiture of the TWE Interest more complex than some of the divestitures previously mandated by the Commission, especially in light of present marketplace conditions.[211] AT&T has faced significant challenges in attempting to dispose of the TWE Interest.[212] For the first time since we mandated AT&T's divestiture of TWE in June 2000. AT&T and AOL Time Warner have identified a mutually acceptable method by which AT&T ultimately will divest the TWE Interest. We have no interest in impeding, delaying, or otherwise adversely affecting AT&T's ability to dispose of the TWE Interest. We also **do** not want **to** establish a divestiture term that will curtail the Applicants' ability lo realize value from the disposition ***of*** the TWE interest, because such a condition may reduce the likelihood that the merger **will** benefit the public.[213] We

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services. The Commission was concerned that requiring a prompt divestiture of the Sprint interest could dilute the value of Sprint's stock. which could impede Sprint's access to capital, and adversely affect its ability to build out its network. We found the potential for adverse effects on Sprint's deployment of service would harm competition. Applicants liken the unique circumstances presented by the TWE divestiture to those surrounding **of** the divestiture of Sprint PCS required in *AT&T-TCI*. *See* Letter from Betsy J. Brady, AT&T Corp. and James R. Coltharp, Comcast Corporation to W. Kenneth Ferree. Chief, Media Bureau (Sept. 20, 2002) at 2-3 ("Trust Term Letter"). We disagree with Applicants that the facts here conform to those surrounding the Sprint divestiture. However, for other reasons, we find that approval ofthe requcstcd trust term will serve the public interest.

[207] ***See*** Trust Term Letter.

[208] Divestiture of the W E Interest is unprecedented both in size and complexity when compared to other divestitures mandated by the Commission as a condition of merger approval. Applicants state that the value of the TWE Interest has been estimated at over $10 billion, which will make it the largest Commission-required divestiture by a factor of three. Trust Term Letter at 3-4 (citing analyst valuations of *W E* Interest and comparing value of TWE Interest to value of assets required to divested in connection with the SBC-Ameritech ($3.27 billion), Vodafone-Bell Atlantic ($3 billion). Bell Atlantic-GTE (1.91 billion). and WorldCom-MCI (1.75 billion) mergers).

[209] The TWE Interest consists of a "diverse collection of assets" including cable facilities, programming networks, a broadcast network, and the Warner Bros. movie and programming studios. Trust Term Letter at 4.

[210] The pannership structure itself is complicated, and the TWE Interest carries no right to participate in the management or operation of TWE. Trust Term Letter at 4-5.

[211] Applicants assert that grant of a five-year term will allow for a "rational, efficient divestiture of the TWE Interest" and thereby avoid the adverre effects of attempting to sell the entire interest during today's difficulr economic times. *Id.* at 6-7. In support, Applicants point to a "general slump in the marker for equity Securities," which has had a disproportionate effect on cable and other communications industry stocks. *Id*

[212] Well before agreement on the terms of the TWE Restructuring Transactions was reached, the Applicants asserted that they had a "strong business incentive" to divest TWE. Application at 58, n.114. Applicants state that AT&T's effons to initiate a public sale of the W E Interest began in February 2001, when AT&T exercised its registration rights under the TWE Partnership Agreement by submitting **a** request to TWE that it reconstitute itself as a corporation and register for sale in an IPO an amount of equity securities representing AT&T Broadband's converted pannership interest. *Id.* at 58-59. The next steps involved the selection of AT&T's and AOL Time Warner's respective investment bankers, **as** well as a third investment banker **who** *was* jointly selected to value the partnership interest, **a** process which took nearly a year. *Id* at 59. Applicants characterized the registration rights process **an a** "complex and difficult" one that was significantly affected hy factors beyond AT&T's control, including prevailing inarket conditions and the actions ***of*** TWE and AOL Time Warner. *Id.* at 60.

[213] Applicants contend that disposirion of the TWE Interest in the manner provided by the TWE Proposal and TWE Restructuring Agreement will ensure that the asset's sale will enhance, rather than impair, the financial health of AT&T Comcasl. Trust Term Letter at 7. This, in turn. will enhance the merged entity's ability to bring the benefits of the merger to the public even more quickly. *Id.* at 7-X. Applicants atsert that the ability of the merged entity to avoid losses associated with "dumping" the TWE Interest, and to achieve gains through monetization ofthe interest,

(continued....)

find that a five-and-a-half-year divestiture period will account for the complexity of divesting the TWE Interest and the difficulties presented by existing marketplace conditions, and will avoid harms to the merged entity's financial position that could prevent it from making upgrades and deploying new services.

82. We also conclude that, although we traditionally require insulation trusts to allow the Trustee full control over the disposition of the assets at issue, the unique circumstances of the instant case warrant our approval of those terms of the Trust Agreement that allow AT&T Comcast to negotiate Alternate Dispositions and direct the Trustee to suspend effons to effect a Public Sale if such negotiations succeed. Given the complexity of the TWE Interest and the fact that the Applicants have better information about the TWE Interest than would any Trustee, the Applicants' involvement in negotiations is likely to facilitate and expedite the sale of the TWE Interest. For example, the TWE Restructuring Agreement is likely to make the TWE Interest more marketable.[214] It is not likely that any Trustee would have the information necessary to negotiate and execute such an agreement. The Trust Agreement's limits on communications between the grantor and Trustee will ensure that any further negotiations necessary for the performance of the TWE Restructuring Agreement, or other agreements, do not provide an avenue for influence or control over TWE. In addition, because AT&T Comcast's interest in TWE and any future interests in entities affiliated with AOL Time Warner will remain in the Trusts, the Trusts will protect against other potential avenues of AT&T Comcast's exercise of influence or control over TWE. In addition, this will ensure that the Trusts comply with our longstanding requirement that all of the interest in a licensee that is insulated pursuant to a trust be subject to that trust.[215] Because ownership of an interest in AOL Time Warner or its affiliates would give AT&T Comcast an indirect interest in TWC or TWE2, any interest in AOL Time Warner must remain in the Trusts to comply with our attribution rules.

83. We find that the establishment of the Trusts, when combined with the additional safeguards proposed by the Applicants, adequately addresses our concerns. AT&T Comcast's ability to influence TWE will he constrained by the safeguards described above. and we will oversee the Applicants' compliance with these safeguards through the enforcement mechanisms described in Appendix B. The insulation of the TWE Interest in the manner proposed by the Applicants removes AT&T Comcast's ability to influence or control TWE or any successor entities and is therefore sufficient to protect against the specific harms identified herein. Because we conclude that the TWE Proposal is an acceptable means of protecting against the potential harms that could result from AT&T Comcast's continued interest in TWE absent the insulation mechanisms provided by the proposal. we condition our approval of the merger on a requirement that, prior to consummation, AT&T transfer ownership of its TWE Interest into Trusts pursuant to the Trust Agreement, and that AT&T Comcast comply with the safeguards and related enforcement mechanisms contained in Appendix B attached hereto. Should AT&T Comcast fail to divest the TWE Interest and successor interests in any entities affiliated with AOL Time Warner by the end of the six-month period following the five-year deadline established in the Trusts, AT&T

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will yield more funds for AT&T sysrem upgrades, deployment of local telephony. and deployment of digital video, high-speed Internet access. and other broadband services to millions of residential consumers. *Id.* (citing an analyst's conclusion that if TWE is sold "we would expect Free cash flow to increase." Richard A. Bilotti *et al.*, Morgan Stanley Equity Research. *Analyzing the AT&T Broadband – Comcasr Merger,* May 3, 2002 at 5).

[214] Trust Term Letter at 5.

[215] "An orherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneticiary in rhe relevant enriry covered by this rule are subject to said trust." 47 C.F.R. 76.501 n.2(d).

Corncast will be subject to enforcement procedures."[216]

84. *Applicability of Remaining AT&T MediaOne Safeguards to* ***ATBT*** *Comcast.* In *AT&T-MediaOne,* the Commission concluded that TWE was attributable to the merged firm in two ways. First, under the cable ownership attribution rules, a company that appoints a director or officer to another company or partnership, or shares common directors or officers with another company or partnership, is deemed to have an attributable interest in that entity.[217] Second, the Commission deemed TWE attributable to the merged firm because it was a limited partnership interest that was not properly insulated.[218] The Commission considered whether AT&T's interest in TWE could be insulated in a manner consistent with our attribution rules, and held that, even if we waived attribution for TWE officers or directors appointed by or shared with the merged firm, AT&T did not conform to our ILP exemption.[219] One of the seven criteria of the ILP exemption provides that a limited partner may not perform any services for the partnership "materially relating to its video programming activities."[220] We interpreted this criterion to prohibit the sale of programming by an insulated limited partner to the partnership (the "no **sale** rule"). We found that AT&T and MediaOne held attributable interests "in numerous programming affiliates" that sold programming to TWE.[221] We concluded that the sale of programming to TWE through these affiliates was a service for TWE "materially relating to its video programming activities" that would afford the merged firm the incentive and ability to influence TWE's video programming choices.[222] We held that the sale of programming by AT&T's programming affiliates to TWE defeated the ability of the merged firm to insulate the TWE Interest.[223]

85. **As** a surrogate for compliance with the no sale rule, the Commission imposed merger conditions governing the relationships between AT&T and its programming affiliates. These affiliates included: Liberty Media Group ("Liberty") which would he wholly-owned by the merged AT&T-

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[216] ***See, e.g., SBC Communications, Inc.,*** 17 FCC Rcd 1397 (2002) (finding SBC apparently liable for a six million dollar forfeiture for willful and repeated violations of a condition imposed in the SBC-Ameritech merger).

[217] 47 C.F.R. § 76.503 n.2(c)

[218] ***See AT&T-MediaOne Order,*** 15 FCC Rcd at 9837 ¶ 43 (citing ***Attribution Order,*** 14 FCC Rcd at 19039¶ 61). Our attribution rules presume that a limited panner may influence or control the operations of the partnership even if its equity interest is very small. Thia presumption is negated if the limited partner satisfies the criteria that form our insulated limited partner ("ILP") exemption. Under our ILP exemption, a limited panner may not: (1) act as an employee ofthe partnership if his or her functions, directly or indirectly, relate to the video programming enterprises of the company; (2) serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video programming enterprises; (3) communicate with the licensee or general partners on matters pertaining to the day-to-day operations *of* its video programming business; (4) have rhe righr to vote **on** the admission of additional general partners (unless that righr is subject to the power of the general partner to veto any such admissions): **(5)** vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction. or is removed for cause as determined hy a neutral arhirer: (6) perform any services lor the partnership materially relating to its video programming activities, except that a limited partner may make loans to or act as a surety for the business; and (7) become actively involved in the management or operation ***of*** the video programming businesses of the partnership. ***See*** 47 C.F.R. § 76.503 n.2(b)(2); ***Attribution Order.*** 14 FCC Rcd ar 19040-41¶ 64.

[219] ***See AT&T-MediaOne Order.*** 15 FCC Rcd at 9840 ¶¶ 48-49

[220] *Id*

[221] *Id.*

[222] ***See AT&T-MediaOne Order,*** 15 FCC Rcd at 9840 ¶ 49 (citing 47 C.F.R. § 76.503 n.2(b)(2); ***Attribution Order,*** 14 FCC Rcd at 19040-41¶ 64).

[223] ***See AT&T MediaOne Order.*** 15 FCC Rcd at 9840 ¶ 49

Mediaone;"" Rainbow, a programming affiliate of Cablevision;[225] and iNDEMAND, in which the merged firm would have a 44% interest.[226] Because AT&T has fully divested Liberty and has divested Cablevision to a non-attributable level, we find that the Liberty and Cablevision safeguards are no longer applicable."' With respect to other programming affiliates, the Commission barred AT&T from involvement in the management or operation of iNDEMAND or any of the programming interests previously held by MediaOne.[228] The purpose of these safeguards was to limit AT&T's involvement in the management and operations of its programming affiliates and thereby constrain AT&T's ability to influence TWE's programming decisions through AT&T's ownership interests in programmers that sold programming to TWE.

86. To the extent any of these safeguards may be applicable to AT&T or AT&T Comcast, the Applicants request that we remove these requirements and urge us not to impose any new safeguards restricting AT&T Comcast's relationships with its programming affiliates.[229] Applicants contend that placement of the TWE interest into a disposition trust constitutes compliance with the AT&T MediaOne Order's requirement that they divest the TWE Interest."' They assert that, by the terms of the AT&T-MediaOne Order, the interim safeguards will cease to apply when TWE is placed in trust.[231] They further state that because the D.C. Circuit remanded the cable horizontal ownership tule and vacated the no sale

224 At that time, Liberty's programming interests included a 100% interest in the Encore Media Group, which operates video programming networks such as Encore, MOVIEplex, and Starz!; a 49% interest in Discovery Communications. Inc., which operates cable networks such as the Discovery Channel, The Learning Channel, and Animal Planer: and minority interests in numerous other programmers. ***AT&T-MediaOne Order,*** 1.5 FCC Rcd at 9825 ¶ 19. Other Liberty programming interests included: USA Networks; Telemundo Network; Telemundo Station Group; BET Holdings II, Inc.; QVC, Inc.; Regional Programming Partners; Canales ñ; Court TV; MacNeil /Lehrer Productions; TV Guide, Inc.; E! Entertainment Television; style; Odyssey; International Channel; Sunshine Network; and Encore Media Croup. *Id.*

225 At the time of the ***AT&T-MediaOne Order,*** AT&T held a 3370 equity and 8.9% voting interest in Cablevision, and had the right to appoint two directors to Cablevision's hoard. Cablevision in turn had a 7.56 ownership interest in Rainbow, which owned in seven national programming networks and, in pannership with FOX Sports Net New York, owned several regional sports networks. Rainbow's programming interests included American Movie Classics, Independent Film Channel, Bravo, and Much Music. Rainbow's programming interests in pannership with **Fox** include Madison Square Garden Network. **Fox** Sports Chicago, **Fox** Sports New England, and Madison Square Garden Metro Guide. ***AT&T-MediaOne Order.*** 15 FCC Rcd at 9826 ¶ 20.

226 ***AT&T-MediaOne Order,*** 15 FCC Rcd at 9826, 9830-31, ¶¶ 20, 27.

211 The Liberty safeguards provided that. if **an** officer or director of the merged firm served as an employee, officer or director of Liberty, that person could iiot participate in matters relating to the video programming activities of AT&T, including deciding what programming to carry. negotiating carriage prices, determining rollout schedules, marketing programming. or evaluating the performance of programming. We also required advance Bureau approval of officers or directors appointed to the Liberty hoard oldirectors by AT&T, and placed limitations **on** the nhility of these officers and directors to communicate with AT&T. We required AT&T to ensure that any directors it appoinied to ihe board of directors of Cablevision were recused from any and all involvement in the management or operation of Rainbow. and we barred AT&T from attempting to influence the management or operation of Rainbow ***AT&T-MediaOne Order.*** 1.5 FCC Rcd at 9899-9901, Appendix B.

228 *AT&T-MediaOne* ***Order.*** **15 FCC Rcd** at 9899-9905. Appendix B. These included the following entities in which MediaOne had an attributable inrerest: E! (including style). Food Network - **TVFN, Fox** Sports New England. Mucic Choice, New England Cable News, Outdoor Life, Speedvision, and Sunshine Network.

229 Letter from Betsy J. Brady, AT&T Corp. and James R. Coltharp, Comcast Corporation, to W. Kenneth Ferrre, Chicf. Media Bureau, FCC (Sept 19, 2002) ("Request").

230 *Id.* at 1-3

231 *Id.*

rule, there is no longer any rationale to impose the safeguards.'" Finally, they contend that in light of "dramatic reductions" in AT&T's affiliated programming holdings, the Commission's driving concern in implementing the safeguards has been eliminated.'"

87. By limiting AT&T's involvement in the sale of programming to TWE, the safeguards relating to AT&T's affiliated programming networks served as a surrogate for actual compliance with the no sale rule during the *AT&T-MediaOne* compliance period. Instead of imposing these safeguards, the Commission could have barred the sale of affiliated programming to TWE. As we explained above, our no sole rule has been vacated by the D.C. Circuit. In our cable horizontal ownership proceeding, we are determining whether and how the sale of programming should be considered in determining a limited partner's ability to influence a pannership. Absent a clear rule governing a partner's ability to remain insulated despite its sale of programming to the partnership, we have considered whether the sale of programming by AT&T Comcast to TWE will otherwise result in harm to the public interest, and whether such harms will be mitigated by the TWE Proposal. We conclude that the TWE Proposal will protect against potential harms that could result from AT&T Corncast's sale of programming to TWE.

88. The no sale rule is intended to determine whether a stakeholder has the ability to influence or control a licensee.[234] We find that, in this case, there already are a number of safeguards in place that will adequately protect against the exercise of such influence by AT&T Comcast — safeguards that were not present in the *AT&T-MediaOne* context.[235] Unlike AT&T-MediaOne, the merger of AT&T and Comcast will not close until the TWE Interest has been placed in trust.[236] The Trustee will have the exclusive power and authority to manage the trust assets and to exercise AT&T Corncast's rights relating to the TWE Interest, including all voting, director appointment, consent or management rights under the TWE Partnership Agreement, and any such rights that AT&T Comcast will have in successor entities following the TWE Restructuring. The Trust Agreement expressly limits the Trustee's ability to communicate with AT&T Comcast about the managcment or operations of TWE, or any entity affiliated with AOL Time Warner that succeeds the TWE Interest. Because these trust-related safeguards restrict AT&T Comcast's ability to influence TWE's programming decisions, these safeguards will equal, and possibly surpass, the programming affiliate safeguards imposed in ***AT&T-MediaOne***. Accordingly. we hereby remove the safeguards relating to Liberty, Rainbow, iNDEMAND, and the programming networks previously held by Mediaone, and we will not impose new conditions on AT&T Corncast's relationships with its programming affiliates.

3. Potential Harms in the Distribution of Video Programming

a. Relevant Markets and Market Participants

89. Applicants claim that, in analyzing possible effects of the proposed merger on the

[232] *Id.* at 2.

[233] *Id.* at 2

[234] Specifically, the no sale rule was intended to prevent an insulated limited panner from influencing the partnership's video progamming choices. *AT&T-MediaOne* ***Order,*** 15 FCC Rcd ar 9839-40 ¶¶ 46-49 (citing 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order.* 14 FCC Rcd at 1904 I ¶ 64).

[235] In suppon of our imposition of these conditions in the *AT&T* ***MediaOne*** *Order*, we relied in part on our decision in *Twentieth Holdings*. ***AT&T-MediaOne Order,*** 15 FCC Rcd at 9840 ¶ 47 (citing *Twentieth* ***Holdings).*** In *Twentieth Holdings*, we held that a corporation's sale of network programming to a television broadcast station, which it sought to insulate using a trust mechanism. would defeat insulation. *Twentieth Holdings,* 4 FCC Rcd at 4054 ¶ 17. **Given** the facts of the instant transaction, we conclude that *Twentieth* ***Holdings*** does not require us to prohibit the **sale** of programming by AT&T Corncast to TWE.

[236] In addition, the Applicants no longer have attributable interests in Liberty or Cablevision. **See** Request at **2**